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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 90

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 13, 1946

CERTIORARI GRANTED MAY 6, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 60

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A. First Circuit	1	1
Petition for enforcement of an order of National Labor Relations Board	1	1
Appendix A—Notice to employees pursuant to decision and order of Board	4	3
Certificate of National Labor Relations Board	6	4
Proceedings before National Labor Relations Board	8	
Order designating Trial Examiner [omitted in printing]	8	
Order as to briefs [omitted in printing]	9	
Order transferring case to National Labor Relations Board [omitted in printing]	10	
Request for oral argument [omitted in printing]	11	
Request and order extending time for filing exceptions and briefs [omitted in printing]	12	
Respondent's statement of exceptions to intermediate report	14	5
Notices as to hearing [omitted in printing]	21	
Appearances at oral argument [omitted in printing]	24	
Decision and Order	25	10
Intermediate Report	31	16
Statement of the Case	31	16
Findings of Fact	32	17
I. The Business of the Respondent	32	18
II. The Organization Involved	32	18
III. The Unfair Labor Practices	33	19
IV. The Effect of the Unfair Labor Practices upon Commerce	41	28
V. The Remedy	41	29
Conclusions of Law	41	29
Recommendations	41	30
Affidavit as to service [omitted in printing]	43	

	Original	Print
Intermediate Report—Continued		
Transcript of hearing	47	31
Caption and appearances	47	31
Colloquy	49	32
Offers in evidence	52	33
Testimony of—		
John J. Elbery	65	41
Frederick A. Newman	148	80
William I. Shooer	153	83
Board's exhibits:		
B-1—Complaint	176	94
Charge	182	96
Respondent's answer	183	96
B-2—Stipulation as to certain facts	186	100
B-3-A—Petition for certification of representatives	189	102
B-3-B—Agreement for consent election	190	104
B-3-C—Certification on conduct of election	191	106
B-3-D—Tally of ballots	192	107
B-3-E—Report on objections	193	108
B-4-A—Letter, Roewer & Reel to A. J. Tower Co., May 25, 1944	198	112
B-4-B—Letter, John T. Noonan to Roewer & Reel, June 6, 1944	199	113
B-5—Note, Jennie Kane to Miss Stone	200	113
B-6—Letter, John T. Noonan to Dr. A. Howard Myers, May 9, 1944	201	114
B-7—Affidavit of Mrs. Jennie A. Kane	203	115
Respondent's exhibits:		
1—Notice of claim of Jennie A. Kane	204	116
2—Statement of Jennie A. Kane, May 8, 1944	205	117
Minute entries	206	117
Opinion, Mahoney, J.	207	118
Decree	216	124
Clerk's certificate [omitted in printing]	217	124
Order allowing certiorari	218	124
Stipulation as to printing record	219	124

1 In the United States Circuit Court of Appeals for the First Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY, RESPONDENT

Petition for enforcement of an order of the National Labor Relations Board

Filed in Circuit Court of Appeals June 15, 1945

To the Honorable, the Judges of the United States Circuit Court of Appeals for the First Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151 et seq.), respectfully petitions this Court for the enforcement of its order against respondent, A. J. Tower Company, Roxbury, Massachusetts, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of A. J. Tower Company and Local #24, Waterproof Garment Workers Union, Affiliated with International Ladies' Garment Workers Union (A. F. of L.), Case No. 1–C–2416."

In support of this petition, the Board respectfully shows:

(1) Respondent is a Massachusetts corporation, engaged in business in the State of Massachusetts, within this judicial circuit, where the unfair labor practices were committed. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board, on March 23, 1945, duly stated its
2 findings of fact, conclusions of law, and order directed to respondent, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, A. J. Tower Company, Roxbury, Massachusetts, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local #24, Water-

proof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

(b) Post at its plant at Roxbury, Massachusetts, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the First Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

3 (c) Notify the Regional Director for the First Region in writing within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(3) On March 23, 1945, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court the

transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript, and upon the order made thereupon set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, and its officers, agents, successors, and assigns, to comply therewith.

NATIONAL LABOR RELATIONS BOARD,
By /S/ Malcolm F. Halliday,
MALCOLM F. HALLIDAY,
Associate General Counsel.

Dated at Washington, D. C., this 13th day of June 1945.

4 *Appendix A*

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not refuse to bargain with local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of our employees in the bargaining unit described herein;

We will not engage in any like or related act or conduct interfering with, restraining, or coercing our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this Union, or any other labor organization.

We will bargain collectively, upon request, with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is: all employees at our Rox-

bury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees.

(Employer) (Title)

By _____

(Representative) (Title)

Dated_____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[*Duly sworn to by Malcolm F. Halliday; jurat omitted in printing.*]

In the United States Circuit Court of Appeals for the First Circuit

[Title omitted.]

Certificate of the National Labor Relations Board

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 3, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in the proceeding had before said Board entitled "In the Matter of A. J. Tower and Company and Local #24, Waterproof Garment Workers Union, Affiliated with International Ladies' Garment Workers Union (A. F. of L.)," the same being known as Case No. 1–C–2416 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of order designating Earl S. Bellman Trial Examiner for the National Labor Relations Board, dated August 3, 1944.

(2) Stenographic transcript of testimony held before Trial Examiner Bellman on August 3, 1944, together with all exhibits introduced in evidence.

(3) Copy of Trial Examiner Bellman's Intermediate Report, dated September 20, 1944 (annexed to Item 13 hereof).

(4) Copy of order transferring case to the National Labor Relations Board, dated September 30, 1944.

(5) Copy of respondent's request to present oral argument before the Board, dated October 9, 1944.

(6) Copy of respondent's telegram, dated October 13, 1944, requesting extension of time for filing brief and exceptions.

(7) Copy of telegram, dated October 13, 1944, granting all parties extension of time for filing briefs and exceptions.

(8) Copy of respondent's exceptions to the Intermediate Report.

(9) Copy of notice of hearing for the purpose of oral argument before the Board, dated January 12, 1945.

(10) Copy of Union's telegram, dated January 18, 1945, requesting postponement of oral argument.

(11) Copy of notice of postponement of oral argument, dated January 22, 1945.

(12) Copy of list of appearances at oral argument held before the Board on February 8, 1945.

(13) Copy of Decision and Order issued by the National Labor Relations Board, dated March 23, 1945, with annexed Intermediate Report, together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof, the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board, in the City of Washington, District of Columbia, this 24th day of May 1945.

[SEAL]

John E. Lawyer,
JOHN E. LAWYER,
Chief, Order Section,
National Labor Relations Board.

14 Before the National Labor Relations Board

Case No. 1–C–2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)

Respondent's statement of exceptions to intermediate report

And now comes the A. J. Tower Company, Respondent in the above-entitled proceedings, and hereby excepts to the Intermediate Report, dated September 29, 1944, as follows:

1. The Respondent excepts to the finding on page 8, lines 12 and 13, that Kane "returned to the plant to see if there was lighter work available for her," for the reason that there is no evidence that Kane ever returned to the plant other than to secure a release. (See page 70 of the Official Report of the Proceedings.)

2. The Respondent excepts to the finding on page 8, lines 17–23 inclusive, that

"Thus while the evidence appears to afford ample basis for a finding that, at the time she voted, Kane was an employee who was not working because she was then ill, it is equally apparent, on the one hand, that the Regional Director's less positive finding as to Kane's status was neither arbitrary nor capricious and, on the other hand, that the evidence does not warrant a finding in line with respondent's contention that Kane was no longer its employee when she voted on May 5, 1944."

for the reason that the finding is unsupported by the evidence; that the evidence set forth by the Trial Examiner, page 8, lines 6 to 10 inclusive, in substantiation of this finding, is not material to a determination of whether Kane was or was not an employee; and that the Trial Examiner does not fairly state all the pertinent facts relating to whether Kane was or was not an employee in that he fails to set forth the evidence indicating that Kane was not an employee of the Respondent at the time of the election on May 5, 1944, including the following facts:

(a) Kane has not worked for the Company since March 24, 1944. (See page 74 of the Official Report of the Proceedings.)

(b) Prior to May 5, 1944, Kane had her name placed upon the lists of the United States Employment Service as available for work. (See pages 57 and 58 of the Official Report of the Proceedings.)

(c) Prior to May 5, 1944, Kane applied for unemployment benefits, indicating, in substantiation of that application, that she had left the employ of the Company in March, 1944, because she couldn't continue to do heavy work of carrying bundles, which was part of her job. (See Respondent's Exhibit No. 1.)

(d) On May 8, 1944, Kane signed a statement in which she said she had left the employ of the Company in March, 1944. (See Respondent's Exhibit No. 2.)

(e) Sometime during the early part of July 1944, Kane requested a release from the Company. (See page 70 of the Official Report of the Proceedings.)

(f) Under date of March 31, 1944, Dr. S. E. Theodore, Mrs. Kane's own physician, signed a written statement to the effect that Mrs. Kane could not engage in any gainful occupation. (See page 125 of the Official Report of the Proceedings.)

3. The Respondent excepts to the finding on page 9, lines 48 to 51 inclusive, that

"The Regional Director's opinion that the respondent failed to correct the voting list or to challenge Kane's eligibility at the polls

'through oversight' is a temperate conclusion in view of all of the evidence in this case."

for the reason that the statement implies that the failure to correct the voting list or to challenge Kane's eligibility at the polls could have been the result of something besides oversight when there is no evidence whatsoever of any other reason or cause so that the implication is uncalled for, unjust, unfair and without a scintilla of evidence to support it. The statement of the Trial Examiner, page 9, lines 46 to 48 inclusive, that he finds it difficult to credit Mr. Elbery's testimony that it was impossible for him to identify his informant, is immaterial to the issue in this case, besides being unjustified and without any support in the evidence, and specifically has no bearing on why the voting list was not corrected or why Kane's eligibility was not challenged at the polls since the information as to Kane not being an employee of the Respondent was communicated to Mr. Elbery on the third day after the polls had closed.

4. The Respondent excepts to the finding on page 10, lines 1 to 5 inclusive, that

"Upon the entire record, the undersigned concludes and finds that the Regional Director's certification of the Union upon the basis of the election of May 5, 1944, was neither arbitrary nor capricious and that, accordingly, it is binding upon the parties to the Agreement for Consent Election."

for the reason that the statement is a conclusion of law and not a finding of fact and for the additional reason that it is unsupported by the evidence and is contrary to the applicable law.

17 5. The Respondent excepts to the finding on page 10, lines 25 to 33 inclusive, that

"The undersigned also finds that at all times since May 5, 1944, the Union has been the bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that by virtue of Section 9 (a) of the Act, the Union has been at all times since May 5, 1944, and now is, the exclusive representative of all of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

for the reason that the statement is a conclusion of law and not a finding of fact and for the additional reason that it is unsupported by the evidence and is contrary to the applicable law.

6. The Respondent excepts to the finding on page 10, lines 40 to 42 inclusive, that the Respondent "has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act," for the reason that the state-

ment is a conclusion of law and not a finding of fact and for the additional reason that it is unsupported by the evidence and is contrary to the applicable law.

7. The Respondent excepts to the finding on page 11, lines 7 and 8, that the activities of the Respondent which are involved in the present case "tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce," for the reason that it is unsupported by the evidence.

8. The Respondent excepts to the conclusions of law on page 11, lines 36 to 58 inclusive, that

"3. Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), was on May 5, 1944, and at all times thereafter has been, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on June 9, 1944, and at all times thereafter, to bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act."

for the reason that such conclusions are contrary to the applicable law.

9. The Respondent excepts to the recommendations on page 11, lines 60 to 65, inclusive, and continued on page 12, lines 1 to 47, inclusive, that the Respondent shall

"1. Cease and desist from:

(a) Refusing to bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the

right to self-organization, to form labor organizations, to join or assist Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union, (A. F. of L), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Post immediately in conspicuous places at its plant in Roxbury, Massachusetts, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a) and (b) of these recommendations; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the First Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondent has taken to comply herewith.

It is further recommended that, unless on or before ten (10) days from the date of the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid."

for the reason that such recommendations are unsupported by the evidence and are contrary to the applicable law.

10. The Respondent excepts to the failure of the Trial Examiner to find pertinent facts which would state the true situation including a finding that Mrs. Kane was not an employee of the A. J. Tower Company on May 5, 1944.

11. The Respondent excepts to the failure of the Trial Examiner to conclude as a matter of law that Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), was not on May 5, 1944, or at any time thereafter, the exclusive representative of any employees of the A. J. Tower Company for the purpose of collective

bargaining within the meaning of Section 9 (a) of the National Labor Relations Act.

12. The Respondent excepts to the failure of the Trial Examiner to conclude as a matter of law that the Respondent has not engaged in and is not engaging in any unfair labor practice within the meaning of Section 8, subsection 1 of the National Labor Relations Act.

13. The Respondent excepts to the failure of the Trial Examiner to conclude as a matter of law that the Respondent has not engaged in and is not engaging in any unfair labor practice within the meaning of Section 8, subsection 5 of the National Labor Relations Act.

14. The Respondent excepts to the Intermediate Report on the whole on the ground that the Trial Examiner's findings of fact, his conclusions of law and his recommendations are unsupported by the evidence, are contrary to the applicable law and are erroneous.

15. The Respondent excepts to the failure of the Trial Examiner to recommend that the entire complaint be dismissed.

Wherefore, the Respondent prays that the entire complaint be dismissed.

Respectfully submitted.

ROBERT G. MOCH,
Counsel for A. J. Tower Company.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 1–C–2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. OF L.)

Decision and order

March 23, 1945

On September 29, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions to the Intermediate Report, and the respondent and the Union filed briefs. Oral argument, in which the respondent and the Union participated, was held before the Board at Washington, D. C., on February 8, 1945. The Board

has considered the rulings made by the Trial Examiner at the hearing and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions, the briefs of the respondent and the Union, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions:

1. The Trial Examiner found, and we agree, that the respondent refused to bargain with the Union in violation of Section 8 (1) and (5) of the Act. The respondent defends its position on the alleged ground that the Union had not been validly chosen as the statutory bargaining representative in a prior election conducted by the Regional Director pursuant to a consent election agreement because Kane, one of the voters, was not an employee. The Regional Director ruled, on the basis of the facts set out in his report, that the respondent could not for the first time challenge the vote of Kane after the results of the election had been announced. As we have previously held,[1] we will not disturb the rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious. No such grounds for disturbing the instant ruling of the Regional Director are present in this case.

2. The respondent contends that its objection to the election on the ground that Kane was not eligible to vote, was filed within 5 days after the issuance of the Tally of Ballots, as provided
26 in the consent election agreement, and hence was timely. The respondent has misconceived the purpose of this provision which is identical with that appearing in the Board's Rules and Regulations.[2] The objections referred to in this provision relate to the conduct of the election and not to the eligibility of the persons who vote. An objection to the conduct of an election, if sustained, voids the results of the election; while a challenge, if sustained, merely eliminates the objectionable ballot. Here, the respondent's representatives certified that the election was properly conducted; its objection merely consisted of a challenge to the ballot of Kane on the ground that she was ineligible to vote. Moreover, insofar as the respondent's objection may be said to concern the conduct of the election, the Regional Director considered and disposed of it on the ground that the respondent was in no position to be heard thereon.

3. The respondent further contends that the right to challenge

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[1] N. L. R. B. v. Capital Greyhound Lines, 45 N. L. R. B. 136, enf'd 140 F. (2d) 734 (C. C. A. 6), cert. den. 323 U. S. 763; Matter of Aetna Pipeline Company, 57 N. L. R. B. 949.

[2] Article III, Section 10, National Labor Relations Board Rules and Regulations—Series 3, as amended.

a voter on the ground that he is a nonemployee cannot be waived as a matter of law. The respondent reasons that since it would not be valid for the respondent in advance to agree with the Regional Director to permit nonemployees to vote, the respondent cannot do so by waiver. Here again we believe that the respondent has misconceived the issue. Were the Regional Director knowingly to agree in advance to permit nonemployees to vote, we might well hold his action to be arbitrary and capricious, but that is not the issue in this case. Here we are confronted solely with the question of whether the respondent, after certifying Kane as an eligible employee voter and permitting her to vote without challenge although facts which it now asserts rendered her ineligible were then in its possession, should be permitted to attack her status as a voter after the results of the election have been announced. The Regional Director's ruling that under the circumstances the respondent's claim could not be considered at that stage, is not arbitrary or capricious as a matter of law, but, as stated in the Intermediate Report, is in complete accord with the established principles and policy of the Board.[3]

We have consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result. Moreover, a postelection challenge forecloses identification of the ballot which would otherwise have been segregated. Since the challenged ballot may have been cast against the Union,[4] it would be necessary, in order to sustain such a challenge, to set aside the election even though a majority of the valid votes have
27 been cast for the Union. We do not believe it to be sound administrative practice to overturn an election under these circumstances when such a result flows from the fault of the objecting party.

4. Finally, the respondent contends that the consent election agreement is invalid because it does not conform with the Mas-

[3] The respondent seeks to distinguish the cases cited in the Intermediate Report, contending that in those cases the post-election challenge attacked the eligibility of the voter on the ground that he did not fall within the appropriate unit while in the instant case the eligibility of the voter is attacked on the ground that she was not an employee. We perceive no distinction in principle between the two grounds of attack which would render the former defense invalid and the latter valid. Section 9 (a) of the Act of refers to a bargaining representative selected by a majority of the employees in an appropriate unit.

[4] We do not regard Kane's signed statement, submitted by the respondent to the Regional Director, as evidence that Kane voted for the Union. Because of a reluctance to antagonize the employer or the Union, a voter, knowing that his statement could not be verified, would not be likely to disclose the true state of his ballot. But what is even more important, we cannot sanction the respondent's invasion of the voter's privacy because such a practice would nullify the very purpose of the secret ballot to insure a free and untrammeled choice. Indeed, we would regard as an unfair labor practice an employer's questioning of his employees as to the manner in which they voted in a Board election. To the extent that any statement in the decision in Matter of Capitol Greyhound, 49 N. L. R. B. 156 is inconsistent herewith, such statement is overruled.

sachusetts law pertaining to arbitration agreements. It is sufficient to say that the Board, in enforcing a national policy, is not bound by local statutory conceptions.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, A. J. Tower Company, Roxbury, Massachusetts, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post at its plant at Roxbury, Massachusetts, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the First Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to

employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

28 (c) Notify the Regional Director for the First Region in writing within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 23rd day of March 1945.

[SEAL]

HARRY A. MILLIS,
Chairman,
JOHN M. HOUSTON,
Member,
National Labor Relations Board.

29 GERARD D. REILLY, concurring specially:

I concur with the majority in the view that the consent election of May 5, 1944, determined that the Union represented a majority of the employees in the bargaining unit involved in this case. Since their conclusion is based in part, however, upon a theory which I think is questionable, I feel that I should express my views separately.

The issue which the respondent seeks to raise here involves the validity of the certification issued by the Regional Director following the consent election. The respondent contends that the record shows that a majority of the employees in the unit did not vote for the Union; that the certification was invalid; and that, therefore, it has no duty under the Act to bargain with the Union as exclusive bargaining representative of the employees involved. This contention is predicated primarily upon the respondent's argument that Kane was not an employee when she cast her ballot. My colleagues hold, in effect, that, since the respondent failed to challenge Kane's ballot at the election, it is estopped from raising that argument by means of an objection to the election and in this proceeding. I am of the opinion that this reasoning is erroneous as a matter of law. Although I have consistently held that binding commitments may estop parties from utilizing the processes of this Board,[8] I do not believe that any doctrine of estoppel is applicable here. The Board's jurisdiction under the Act to prevent an employer from engaging in unfair labor practices in violation of Section 8 (5) is restricted to instances where there is a refusal to bargain with a representative of a majority of employees in an appropriate unit. A determination that a labor organization is the majority representative contemplated by the Act, where its designation as such depends upon ballots cast by

[8] See dissenting opinions in Matter of Packard Motor Company, 47 N. L. R. B. 933; and Matter of Federal Motor Truck Company, 49 N. L. R. B. 87.

individuals who were not employees when said ballots were cast,[1] is clearly not within the Board's power. Therefore, *a fortiori*, no theory of "waiver" or "estoppel" will supply the Board with such jurisdiction.

However, I am of the opinion that the weight of the evidence in the case establishes that Kane was an employee at the time of the election and, therefore, the Union was properly selected by a majority of the employees. The fact that Kane's name was included on the pay-roll list which the respondent itself drew up and vouched for as a list of eligible employee voters, *prima facie* establishes that Kane had the status of an employee. Kane's statement in her application for unemployment insurance benefits is entitled to no more weight than, and is in effect neutralized by, her statement to an agent of the Board that she did not intend thereby to sever her employment relationship with the respondent. Nor may such statements be regarded as an admission against interest since Kane was not an interested party in this proceeding. Kane did not in fact accept any other employment. On this state of the record, I am of the opinion that the respondent has not successfully overcome the *prima facie* case establishing Kane's employee status at the time of the election.

Signed at Washington, D. C., this 23rd day of March 1945.

GERARD D. REILLY,
Member,
National Labor Relations Board.

30 *Appendix A*

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not refuse to bargain with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of our employees in the bargaining unit described herein;

We will not engage in any like or related act or conduct interfering with, restraining, or coercing our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing,

[1] Ct. N. L. R. B. v. Capital Greyhound Lines, 49 N. L. R. B. 156, enf'd 140 F. (2d) 754 (C. C. A. 6), cert. den., 322 U. S. 762.

and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this Union, or any other labor organization.

We will bargain collectively, upon request, with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is: all employees at our Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees.

A. J. TOWER COMPANY.

(Employer)

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

31. BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRIAL EXAMINING DIVISION; WASHINGTON, D. C.

Case No. 1-C-2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)

Messrs. Leo J. Halloran and Samuel G. Zack, for the Board.

Herrick, Smith, Donald, Farley & Ketchum, by Mr. Robert G. Moch, of Boston, Mass., for the respondent.

Mr. George E. Roewer, of Boston, Mass., for the Union.

Intermediate report

Sept. 29, 1944

Statement of the case

Upon a charge duly filed on June 9, 1944, by Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), herein called the

Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the First Region (Boston, Massachusetts), issued its complaint, dated July 24, 1944, against A. J. Tower Company, Roxbury, Massachusetts, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notices of hearing thereon, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint, as amended at the hearing, alleged in substance: (1) that all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining; (2) that on or about May 5, 1944, the Union was designated by the employees in the aforesaid unit as their representative and has at all times since been such representative for the purposes of collective bargaining; (3) that on or about May 25, 1944, and continuously thereafter the Union requested the respondent to bargain collectively; (4) that on or about June 6, 1944, and continuously thereafter the respondent refused to bargain collectively with the Union; and (5) that by such refusal the respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

32 On August 2, 1944, the respondent filed its answer which, as amended at the hearing, admitted the appropriateness of the unit, and that the Union had requested and the respondent had refused to bargain collectively. The answer denied, in substance, that the Union is or ever has been the duly designated bargaining agent of the employees in the appropriate unit because the result of a consent election held on May 5, 1944, would be a tie vote if a ballot challenged by the Union were opened, upon overruling the challenge, and proved to be against the Union, and if a ballot cast for the Union by Jennie A. Kane, who was not an employee of the respondent at the time of the election and has not since been such an employee, were subtracted from the vote received by the Union.[1]

[1] In the consent election, 116 votes were cast for the Union and 114 against the Union. There was also 1 ballot challenged by the Union. Under the respondent's contention, Kane's vote for the Union would be subtracted from the votes received by the Union and the challenged ballot, if against the Union, would be added to the votes against the Union, thus producing a tie vote of 115 for and 115 against the Union.

Pursuant to notice, a hearing was held on August 3, 1944, at Boston, Massachusetts, before Earl S. Bellman, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the close of the hearing, without objection, the pleadings were conformed to the proof as to formal matters. The parties were afforded the opportunity to argue orally before the undersigned and were given leave to file briefs with the undersigned. Briefs have been received from the respondent, the Union, and the Board. Also a letter from the respondent has been considered as a supplement to its brief.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of fact

I. THE BUSINESS OF THE RESPONDENT

A. J. Tower Company, a Massachusetts corporation, is engaged at its principal office and plant in Roxbury, Massachusetts, in the manufacture and sale of waterproof oiled clothing, aprons, hats, and fabrics.[2] During the calendar year of 1943, the value of the respondent's raw materials, consisting of cotton textiles, oils, threads, fastenings, and sundries, was in excess of $1,000,000. Approximately 90 percent of such raw materials was shipped to the respondent's plant from points outside of the Commonwealth of Massachusetts. During 1943, the value of the respondent's finished product was in excess of $2,500,000,[3] of which 95 percent was transported to points outside of the Commonwealth of Massachusetts. For the purpose of this proceeding, the respondent concedes that it is engaged in interstate commerce and is subject to the provisions of the Act.

II. THE ORGANIZATION INVOLVED

Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), is a labor organization which admits to membership certain employees of the respondent.

[2] The respondent has one wholly owned subsidiary, A. J. Tower Sales Company.
[3] The value of the above products which went to various departments of the United States Government was $2,250,342.08.

33 III. THE UNFAIR LABOR PRACTICES

A. Chronology of events

On April 24, 1944, the Union filed its Petition for Certification of Representatives in Case No. 1–R–1880, pertaining to certain employees in the respondent's Roxbury plant, with the Board at its office for the First Region at Boston, Massachusetts. Thereafter on April 27, 1944, an Agreement for Consent Election was duly signed by the respondent and the Union and approved by the Board's Regional Director. Said agreement provided, among other things, for an election on Friday, May 5, 1944, among the employees of the respondent alleged in the complaint in this case and admitted in the answer to constitute an appropriate unit; that the pay-roll period for eligibility would be April 21, 1944; that employees in the unit "who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off" should be eligible voters; that employees "who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election" were not eligible to vote; and that objections "to the conduct of the ballot, or to a determination of representatives based on the results thereof," might be filed with the Regional Director within five days after the issuance of the Tally of Ballots. The agreement also contained the following provision:

> Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

On May 1, 1944, the respondent, in conformity with the Consent Election Agreement, furnished the Regional Director with a complete list of its employees in the appropriate unit on its pay roll for April 21, 1944.[4] The pay-roll so furnished was the only pay-roll used at the election. Jennie A. Kane, a stitcher whose classification admittedly falls within the appropriate unit, was marked upon the pay-roll setting out the eligible voters as "out sick." Kane, who last worked at the respondent's plant on March 24, 1944, had sent her forelady a note on March 31, 1944, stating that she had not been to work the preceding week because she had been sick and asking that her pay be given to the bearer of the note.

[4] The evidence shows that the employees, on the pay roll of April 21, performed the work for which they were then paid during the period from April 7 to April 14, as it is the respondent's practice to pay its employees one week after the termination of the work period for which payment is made.

Kane cast an unchallenged ballot[5] at the election duly held on May 5, 1944, under the supervision of an agent of the Regional Director as provided in the agreement. At the election the respondent was duly represented by two observers who had been informed of their rights and duties with respect to such matters as the challenging of the ballot of any person not qualified to vote. One of the respondent's observers, a clerk in the factory office, regularly received records in the course of her duties by which she would have known whether any given employee, such as Kane, had actually worked during any given week.

After the polls had closed on May 5, the two authorized observers of the respondent, the two authorized observers of the
34 Union, and the agent of the Regional Director duly signed the customary Certification on Conduct of Election which set out that the "balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote." Under the date of May 5, 1944, there was issued, over the signatures of representatives of the Regional Director, the respondent, and the Union, the Tally of Ballots which set out that there were approximately 250 eligible voters; that 230 valid votes were cast, of which 116 were cast for the Union and 114 against the Union; and that in addition there was 1 challenged ballot.

The respondent filed objections to the election on May 9, 1944, clearly within the 5-day period provided in the agreement for filing such objections. In its objections the respondent stated that it had come to its attention after the election that Kane was not an employee;[6] challenged "the right of Mrs. Kane to vote in the election of employees at its plant" and "the ballot cast by her"; pointed out that the ballot challenged by the Union in the election, won by only 2 votes, had not been passed on; requested a hearing for the purpose of passing on this challenged ballot;[7] and argued that if the challenge to said ballot were overruled and the ballot should prove to be against the Union it would then "become material to rule upon the challenge which the Company hereby makes to the vote of Mrs. Kane."[7] The objections also set forth as facts with respect to Kane, the following:

Mrs. Kane was employed by A. J. Tower Company from March

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[5] In Board election practice, challenged ballots are distinguishable but unchallenged ones are not. Since Kane's ballot was not challenged it was counted and was in no way differentiated from the rest of the unchallenged ballots.

[6] It should be noted that the agreement provided that employees who had "since quit" and had not been "rehired" were not eligible to vote.

[7] It was then and is now clearly impossible to determine which one of the 230 ballots which had been counted as valid had been cast by Kane. It should also be noted that the respondent chose as its starting point in exploring the possibility that the election might be found to be a tie, a hearing upon the ballot challenged by the Union at the election on May 5, rather than any ruling upon its post-election challenge concerning Kane.

16, 1943, through March 24, 1944. After the latter date Mrs. Kane did not ever again report for work at the Tower Company and did not appear at the plant of the Tower Company until she appeared for the purpose of voting on May 5, 1944. The Tower Company, not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote. It has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March 1944, and that her reason for leaving was that she "could not continue to do heavy work of carrying bundles which was part of her job." The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment.

A conference was held among representatives of the respondent, the Union, and the Board on May 12, 1944, for the purpose of considering the respondent's objections. A hearing thereafter was held on said objections on May 22, 1944, which was attended by representatives of the respondent, the Union and the Board. On May 24, 1944, the Regional Director issued and duly served copies of his "Report on Objections." This report was duly amended on May 31, 1944.*

The Regional Director's Report on Objections, summarizing the basis of the respondent's objections, sets out the above-quoted paragraph concerning Kane contained in the respondent's objections. The report then states:

The Company contends that irrespective of any oversight or neglect on its part, the vote cast by Mrs. Kane was ineligible beyond question.

The report continues with the following summary of the conflicting evidence considered by the Regional Director as to Kane's employment status and as to whether she had ever revealed how she had cast her ballot:

* * * It [Company] submitted a witnessed statement signed by her on May 8, 1944, stating that she "left the employ of A. J. Tower Co. in March 1944, because of sickness and have been treated by Dr. Theodore who found that I was not able to engage in any gainful occupation. I applied for social security benefits because of this. I signed a paper for the Union at the Tower Co. as I felt it was a good thing. I voted for the union at the election on last

* The discussion herein is based on the amended report.

Friday. I have not worked since leaving the Tower Co. because of my physical condition."

Susequently interviewed by an Agent of the Board on May 23, 1944, Mrs. Kane asserted—"On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. & in fact I intend to return to the Company when I have regained my strength. I did not think that my application for unemployment benefits would be considered a termination from the Company. I am 64 years of age and have a certificate from my physician as to my general poor health. On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself an employee of the Company & therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.

"On May 8, 1944, Mr. Ellberry of the Co. & another gentleman whose name I've forgotten visited me at my home & questioned me. I informed them that I thought the Union was a good thing but I do not recollect ever telling them exactly how I voted at the election. I have read a copy of a statement that I signed on May 8, 1944, for Mr. Ellberry but my words have been misconstrued. I did say 'I applied for social security benefits because of this' but the sentence should have been continued to show it was because of my sickness and not infer that I had left the Company because the work was too heavy.

"Shortly after I took sick, I wrote a note to Miss Stone, in the office at the A. J. Tower Co., which Miss Higgins a fellow employee carried for me. In this note, I told Miss Stone that I was under a docter's care & that I intended to return to the Company as soon as I was well.

36 "Incidentally, when Mr. Ellberry was at my home on May 8, 1944, I told Mr. Ellberry that I intended to return to my job as soon as I was able & asked him would I get my job back or would he give me a release. Mr. Ellberry said 'I don't see why you need a release.' This was in answer to my question, 'Would I need a release to obtain social security benefits?' When I sought social security benefits, it was something I thought to which I was entitled because of my illness; so I had been told by several of my friends. I did not think that it would be considered quitting my job at the A. J. Tower Co. because naturally I intended to go back to the Co."

The report then sets out evidence secured by subsequent investigation and the Regional Director's concluding findings and rulings, including footnote citations, in the following language:

Subsequent investigation confirmed the fact that Mrs. Kane did advise the Division of Employment Security of the Commonwealth of Massachusetts on April 28, 1944, that she had left her employment with the Company in March and that the reason stated was her inability to do heavy work of carrying bundles.

A Notice to Employer of Claim Filed was sent to the Company by the U. S. Employment Service on May 1, 1944, the same day on which the Company submitted "a complete list of employees of the A. J. Tower Co. on the payroll of April 21, 1944, who were in the unit designated in the consent agreement for an election to be held May 5, 1944."

The Company contends that it does not know the exact date of receipt of the notice of claim, but does not deny that it was received prior to the date of the election, and in the opinion of the undersigned it failed, through oversight, to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls.

The Board Agent conducting the election reports that he followed the usual practice of instructing the observers at the election, including the two Company representatives, Helen Considine and Charles Kissork, who were accompanied by the Company counsel, of their right to challenge the ballot of any person believed ineligible to vote. These observers were present when Mrs. Kane cast her ballot and did not challenge her right to vote. Prior to the count of the ballots, the Company tellers conferred with the Company counsel when asked to certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to vote their ballots in secret. After approval by counsel, both signed the usual Certification on Conduct of Election.

The fact remains that the list of eligible voters was prepared solely by the Company and was submitted by them as the exclusive list of eligible voters. Four or five days prior to the election, the Company knew, by reason of a letter from the U. S. Employment Service, that Mrs. Kane had made an application for unemployment compensation. It is this application that the Company urges as a basis for determining that she was not an employee at the time of the election and therefore not entitled to vote; yet not only did it do nothing to correct the eligibility list, but it did in fact acquiesce in her casting a ballot. Whether or not Mrs. Kane
37 was an employee entitled to vote was, under the circumstances, a fact peculiarly within the Company's knowledge. Yet it was not until four days after the election that they raised any objection to her vote.[1]

Although the question of Mrs. Kane's status as an employee is

[1] See N. L. R. B. v. Capitol Greyhound Lines, et al., No. 9592 U. S. C. C. A.—Sixth; decided January 31, 1944.

not quite clear, the undersigned is of the opinion that under the circumstances set forth the Company has waived its right to challenge her vote or to object to the election on this ground.[2] To hold otherwise would vitiate the Board's procedure of having observers present at the polls, of challenges by such observers, and of certifications of conduct by the parties.

Since the overruling of this point makes unnecessary a ruling on the vote challenged at the election, the undersigned finds that a majority of the valid votes have been cast for the Union indicated below. Pursuant to Section 8 of the Agreement for Consent Election the undersigned hereby finds and determines that Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies' Garment Workers Union (A. F. of L.) is the exclusive representative of all the employees in the unit defined in Section 2 of the Agreement for Consent Election, for the purposes of bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

By letter dated May 25, 1944, the Union requested a collective bargaining conference as to the terms of an agreement covering the employees in the unit for which it had been certified.[3] By letter dated June 6, 1944, the respondent replied to the Union's letter of May 25, stating that in the light of "certain matters having to do with the election" with respect to which the Union was familiar, the respondent did not believe that the Union had been "validly chosen as the bargaining agent of the majority of the employees in the unit in which the election was held."

B. The respondent's contentions

The respondent raises no question as to the manner in which the election was conducted and makes no claim that the Regional Director acted arbitrarily or capriciously in the way he conducted his investigation of the objections or arrived at his decision thereon. However, the respondent contends, in essence, that "as a matter of law" the Regional Director's decision is arbitrary and capricious because it permits the vote of a non-employee to determine the result of an election among its employees and because there is no basis for the finding therein that through "negligence or laches" the respondent waived its right to challenge Kane's vote or to object to the election.

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[2] See In re American Granite Finishing Company and International Union of Operating Engineers (XXVIII NLRB 739).

[3] The amendment of May 31, 1944, did not modify the certification but pertained only to the third paragraph of the section of the Regional Director's report last quoted above.

38 As to the vote of a non-employee determining the election, it should be noted that the Regional Director made no finding as to how Kane voted or as to whether or not Kane was an employee of the respondent at the time of the election. The Report on Objections does not resolve the first point. On the second, it refers to Kane's employment status as "not quite clear." As to Kane's status, the evidence shows that Kane has been ill; that the respondent has never set a time limit as to how long an employee may be absent from work because of illness before being separated from the pay roll; that in some cases employees are away from work "a good many months" because of illness; that Kane's name was not taken off the respondent's pay roll until some time after May 8, 1944; and that it was not until the early part of July, when she returned to the plant to see if there was lighter work available for her, that Kane was first informed that her name was no longer on said pay roll. Further, there is no evidence that Kane has worked anywhere else since March when she sent her forelady at the respondent's plant a note that she was not working because she was ill. Thus while the evidence appears to afford ample basis for a finding that, at the time she voted, Kane was an employee who was not working because she was then ill, it is equally apparent, on the one hand, that the Regional Director's less positive finding as to Kane's status was neither arbitrary nor capricious and, on the other hand, that the evidence does not warrant a finding in line with respondent's contention that Kane was no longer its employee when she voted on May 5, 1944.

It should further be noted that for Kane's vote to have been determinative in reducing the election to a tie, every one of several factors would have had to have been resolved in line with the respondent's hypotheses. The Union's challenge of one unopened ballot made at the polls on May 5 would have had to have been overruled by the Regional Director. That ballot, upon being opened, would have had to have been cast against the Union. It would also have been necessary for the Regional Director to have found that a ballot which had been duly cast at the election in the presence of authorized observers for the respondent, which had not been challenged at the polls, and which had therefore not been segregated, but rather had been counted as valid along with the other valid ballots, could have been challenged four days after the polls had been closed. It would further have been necessary for the Regional Director to have found that Kane had not been an employee and had not been entitled to vote. It would then have been necessary either to have held a new election on the assumption that Kane might have voted for the Union, thus reducing the vote

to a tie,[30] or to have ignored the secrecy of the ballot and to have attempted to determine how Kane voted. If the latter course were to have been followed, the word of the voter, who would thus have been placed under pressure by having to reveal publicly how her ballot had been cast, would have had to have been accepted as final, since the ballot itself could not have been identified for examination. It is clear from the Regional Director's report that he believed that to have followed such a post-election procedure as the foregoing would have involved would have vitiated the Board's established election practices, and that in view of his ruling to that effect it became unnecessary for him to resolve other matters.

As to the question of negligence or laches, it should be noted that the Regional Director did not make any finding of negligence or laches but found rather, in effect, that the respondent had failed "through oversight" to correct the voting list or challenge
39 the eligibility of Kane at the polls and that under all the circumstances it would vitiate the Board's election procedure to permit a post-election challenge of her vote. It is evident that the Regional Director had in mind the problems of post-election procedure discussed above. Among the circumstances which he specifically cited were that the balloting had been duly conducted in the presence of two observers for the respondent who had failed to challenge Kane's vote and who had thereafter signed the Certification on Conduct of Election; that the list of eligible voters had been prepared solely by the respondent; that Kane's unemployment compensation application had been received by the respondent prior to the election; that whether Kane had been an employee entitled to vote had been peculiarly within the respondent's knowledge; and that no objection to Kane's vote had been raised until four days after the election. The Regional Director cited the American Granite Finishing case [31] as authority for his determination that "under the circumstances" the respondent had "waived its right." In the case cited, the only labor organization involved in an election which had been duly conducted sought, in effect, to dissipate a tie vote by deducting the ballots of two persons, who allegedly had voted against it, on the ground that both persons were clerical employees who were not properly within the appropriate unit. Both employees had been listed as eligible voters and both had cast unchallenged ballots. In deciding in that case that "under the circumstances" the labor organization had "waived its right" to oppose the result of the election, the Board relied upon such circumstances as the presence of the observer for the labor

[30] Under the terms of the consent agreement, the Regional Director had authority to void the result of the election and to conduct a new election. There is no evidence that the respondent at any time requested such a procedure.

[31] Matter of American Granite Finishing Company, 28 N. L. R. B. 739.

organization at the polls and his failure to challenge the two ballots or to object to the inclusion of the names of the two employees on the list of eligible voters.

At the hearing before the undersigned, no question was raised as to the regularity of the election involved in the instant matter. Also it was admitted that the respondent furnished the pay roll which contained Kane's name and which was the only pay roll used at said election. As to the respondent's knowledge of Kane's employment status, the evidence shows that the respondent's copy of Kane's application for unemployment compensation was in the respondent's files when Superintendent Elbery [12] looked for it on May 8; that it was stamped as mailed on "May 1, 1944"; that in the normal course of business it would have been received on Tuesday, May 2; and that it was customary for such matter to be placed on Superintendent Elbery's desk the date received. Elbery testified that he first found the application in the respondent's files upon making a search for it upon his return on May 8 from the office of United States Employment Service in Boston where he had gone in an effort to verify a statement made to him on the morning of May 8 by an unidentifiable employee in Kane's department to the effect that Kane should not have voted because she was not an employee and was working somewhere else.[13] The undersigned finds it difficult to credit Elbery's testimony that it was impossible for him to identify his informant, especially in view of the smallness of the respondent's plant, the recency of the event, and the investigation which Elbery testified was initiated as a result of that statement. But in any event, the Regional Director's opinion that the respondent failed to correct the voting list or to challenge Kane's eligibility at the polls "through oversight" is a temperate conclusion in view of all of the evidence in this case.

Upon the entire record, the undersigned concludes and finds that the Regional Director's certification of the Union upon the basis of the election of May 5, 1944, was neither arbitrary nor capricious and that, accordingly, it is binding upon the parties to the Agreement for Consent Election.[14]

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[12] John J. Elbery. The last name is spelled differently in the transcript as compared to the Regional Director's report cited above.

[13] There is no evidence that Kane has worked anywhere else.

[14] Matter of Capitol Greyhound Lines et al., 49 N. L. R. B. 156, enforced 140 F. (2d) 754 (C. C. A. 6), cert. denied, 64 S. Ct. 1285, and Matter of Aetna Fire Brick Company, 56 N. L. R. B. No. 168.

The following language in the Board's decision in the Capitol Greyhound case, holding the Regional Director's determination to be binding in the absence of a showing that his rulings were arbitrary or capricious, is noteworthy:

To hold otherwise would permit an employer deliberately to ignore binding commitments embodied in a consent agreement; would open the door to subterfuges for hampering and delaying a final determination of bargaining representative; and would tend to defeat, rather than to effectuate, the policies of the Act.

It should also be noted that Article III, Section 12, of the Board's Rules and Regulations, Series 2, effective November 26, 1942, as amended, provides specifically concerning consent elections that "the rulings of the Regional Director shall be final, and the statement of the Regional Director of the results thereof shall be final."

C. The refusal to bargain collectively

1. The appropriate unit

The undersigned finds, in accordance with the Agreement for Consent Election, that all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment and that said unit insures to such employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

2. Representation by the Union of a majority in the appropriate unit

The undersigned also finds that at all times since May 5, 1944, the Union has been the bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that by virtue of Section 9 (a) of the Act, the Union has been at all times since May 5, 1944, and now is, the exclusive representative of all of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain

The undersigned further finds that on June 6, 1944, and at all times thereafter, the respondent has refused to bargain collectively with the Union as the exclusive representatives of its employees within the unit hereinabove found to be appropriate, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

41 IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The undersigned finds that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since it has been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent, upon request, bargain collectively with the Union.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of law

1. Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), was on May 5, 1944, and at all times thereafter has been, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on June 6, 1944, and at all times thereafter, to bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, A. J. Tower Company, Roxbury, Massachusetts, its officers, agents, successors, and assigns shall:

42 1. Cease and desist from:

(a) Refusing to bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Post immediately in conspicuous places at its plant in Roxbury, Massachusetts, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a) and (b) of these recommendations; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the First Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondent has taken to comply herewith.

It is further recommended that, unless on or before ten (10) days from the date of the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, as amended, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of the said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the parties or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

Earl S. Bellman,
EARL S. BELLMAN,
Trial Examiner.

Dated: September 29, 1944.

47

Before the National Labor Relations Board
First Region

Case No. I-C-2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL NO. 24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES' GARMENT WORKERS' UNION (AFL)

ROOM 606, OLD SOUTH BUILDING,
294 WASHINGTON STREET,
Boston, Massachusetts, Thursday, August 3, 1944.

Pursuant to notice, the above-entitled matter came on for hearing at 10 a. m.

Before EARL S. BELLMAN, Esq., Trial Examiner.

Appearances Leo J. Halloran, Esq., and Samuel G. Zack, Esq.,

Boston, Mass., appearing on behalf of the National Labor Relations Board. George E. Roewer, Esq., 20 Pemberton Square, Boston, Mass., appearing on behalf of the Complainant Union. Robert G. Moch, Esq., Herrick, Smith, Donald, Farley & Ketchum, 1 Federal Street, Boston, Mass., appearing on behalf A. J. Tower Company, Respondent.

49 PROCEEDINGS

Trial Examiner BELLMAN. The hearing will be in order.

This is a formal hearing in the matter of A. J. Tower Company and Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers' Union (AFL), Case No. I–C–2416, for the National Labor Relations Board.

The Trial Examiner appearing for the National Labor Relations Board is Earl S. Bellman.

I would like to have all of the appearances stated orally for the record at this time.

Mr. HALLORAN. Leo J. Halloran, appearing for the Board.

Mr. MOCH. Robert G. Moch, appearing for the Company.

Mr. ROEWER. Appearing for the union is George E. Roewer.

Trial Examiner BELLMAN. At this time there are a few formal introductory remarks which I would like to make.

The official reporter makes the only official transcript of these proceedings. Citations in briefs or arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation.

It may become necessary to make corrections in the record during the hearing. If so, the parties desiring the corrections will submit
50 the suggested corrections to the other party or parties in writing. When this has received their written approval it will be submitted to the Trial Examiner.

In the event that the parties are unable to agree upon proposed corrections, the Trial Examiner will then consider motions to correct the record or may, upon his own motion, order certain corrections made.

If the parties have not been able to agree upon such corrections before the close of the hearing but have entered into a stipulation concerning such matters after the close of the hearing but before the transfer of the case to the Board, such stipulations or motions should be addressed to the Trial Examiner in care of the Chief Trial Examiner in Washington.

After the transfer of the case to the Board all such communications should be directed to the Board itself, inasmuch as by such transfer to the Board the Trial Examiner's connection with the case ceases.

Since this is a formal hearing you will maintain the dignity and decorum which usually accompany judicial proceedings. I will also ask that you do not smoke in the hearing room while the hearing is actually in progress.

Concise statements of reasons for motions or objections will be permitted, but the Trial Examiner may go off the record for the purpose of hearing extended argument.

Off-the-record discussion or argument will not be included
51 in the official transcript unless an order to that effect be made by the Trial Examiner either at the request of the parties or upon his own motion. All requests to go off the record are to be directed to the Trial Examiner and not to the official reporter, please.

The Trial Examiner will allow an automatic exception to all adverse rulings, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

Five copies of all pleadings submitted during the hearing are to be filed with the Trial Examiner. All exhibits offered in evidence shall be in duplicate.

At the conclusion of the hearing oral argument will be held before the Trial Examiner, during which he will feel free to discuss with and ask questions of counsel or representatives of the parties, with respect to their contentions as to the issues, the facts and the legal principles involved. This oral argument at the close of the hearing will be included in the stenographic report of the hearing.

Any party, upon request made before the close of the hearing, will be granted five days in which to file a brief with the Trial Examiner. Five copies of such briefs shall be directed to the Trial Examiner in care of the Chief Trial Examiner in Washington.

At this time counsel for the Board may proceed and present the formal papers.

52 Mr. HALLORAN. Will the official reporter mark this series of documents as "Board's Exhibit 1" for identification, and Board's Exhibit 1 for identification, Duplicate.

(Thereupon the documents above referred to were marked as "Board's Exhibit No. 1" for identification.)

Offers in evidence

I now offer in evidence what has been marked as "Board's Exhibit 1" for identification and "Board's Exhibit No. 1" for identification, Duplicate, consisting of the following formal papers in the case:

Notice of hearing in the instant case, signed by A. Howard Myers, Regional Director for the First Region, dated July 24, 1944;

Complaint issued by A. Howard Myers, Regional Director of the Board for the First Region, dated July 24, 1944;

Affidavit as to service of the aforementioned documents, showing service of the same, with return postal registry receipts showing receipt of the same, the affidavit being subscribed and sworn to by Doris Glassman, before Martha R. Dunleavy, Designated Agent for the Board, showing service of the foregoing on A. J. Tower Company and on Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (AFL).

Also as part of this exhibit I offer a copy of the charge filed by George E. Roewer, attorney for Local No. 24, Waterproof Garment Workers Union affiliated with Interna-
53 tional Ladies' Garment Workers Union (AFL), and further, as part of this exhibit, I offer the answer filed by A. J. Tower Company.

Trial Examiner BELLMAN. Is there any objection to this exhibit, these documents described [handing Board's Exhibit 1 for identification to Mr. Moch?]

Mr. MOCH. The respondent has no objection.

Trial Examiner BELLMAN. Has the Union any objection?

Mr. ROEWER. No objection.

Trial Examiner BELLMAN. There being no objection, the documents are received in evidence as Board's Exhibit 1.

(The documents heretofore marked as Board's Exhibit 1 for identification, were received in evidence.)

Are there any other formal papers of this type now?

Mr. HALLORAN. There are no other formal papers of this type.

Trial Examiner BELLMAN. Are there any preliminary motions of any kind by any of the parties? (No response.)

There appear to be none.

I would like to spend a little time in studying the answer and comparing it with the complaint.

The hearing will be in recess for ten minutes.

(Recess for ten minutes, following which the hearing was resumed.)

The hearing will be in order.

54 Mr. HALLORAN. My attention has been directed to a slight error in paragraph 4 of the complaint, and at this time I move to amend the complaint in this action, in paragraph 4 thereof, by adding after the words "employees of the company," in the first line, the words "at its Roxbury plant," so as to read "all

employees of the company at its Roxbury plant, except for executives, foremen" and so forth.

The amendment is offered because the attorney for the Board has been advised by counsel for the company that the company does have other plants.

Trial Examiner BELLMAN. Does the company have any objection to this amendment?

Mr. MOCH. None.

Trial Examiner BELLMAN. The amendment merely adds four words, "at its Roxbury plant"?

Mr. HALLORAN. That is correct.

Trial Examiner BELLMAN. The amendment is granted.

In view of the amendment does the respondent care to amend the answer?

Mr. MOCH. I move to amend the answer by striking out the fourth paragraph of the answer and substituting therefor, "The respondent admits the allegations set out in paragraph 4 of the complaint."

Trial Examiner BELLMAN. Is there any objection to so amending the answer? (No objection.)

55 Hearing none, the answer is so amended.

Mr. HALLORAN. Will the official reporter mark this document as "Board's Exhibit 2" for identification and "Board's Exhibit 2" for identification, Duplicate.

(Thereupon the document above referred to was marked as "Board's Exhibit 2" for identification.)

I now offer in evidence what has been marked for identification as "Board's Exhibit 2," being a stipulation entered into on August 2, 1944, between the attorney for the Company and the attorney for the Board.

Do I understand that the company stipulates orally at this time that it is engaged in interstate commerce and is subject to the provisions of the National Labor Relations Act?

Mr. MOCH. I do not think that we can stipulate that. That is a conclusion of law. I think there is not any dispute as to the facts, and that is the conclusion to be drawn therefrom.

Mr. HALLORAN. Will the company admit, for the purpose of this hearing, that it is engaged in interstate commerce?

Mr. MOCH. Yes.

Mr. HALLORAN. And that it is subject to the provisions of the National Labor Relations Act?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. I would like to point out at

56 this time that the stipulation is signed only by the company and by the Board and that the stipulation covers more than

commerce. The document marked as Board's Exhibit 2 for ide
tification stipulates as to the nature of the union, as to certa
facts concerning a consent election agreement and also as to t
request to bargain and refusal.

It appears that the union is a party to this proceeding and
represented by counsel. I should like to go off the record to s
if the union wants to join in this stipulation.

Mr. HALLORAN. May we go off the record?

Trial Examiner BELLMAN. Off the record.

(Discussion off the record.)

On the record.

Mr. HALLORAN. Counsel for the union has assented in writi
on the stipulation, to the allowance of the stipulation.

Trial Examiner BELLMAN. In other words, he is joining in t
stipulation and signing it as a document in evidence?

Mr. ROEWER. That is correct.

Trial Examiner BELLMAN. Is there any objection to the doc
ment being received as Board's Exhibit 2? [No objection.]

There appears to be no objection. The document is admitted as Board
Exhibit 2.

(The document heretofore marked as "Board's Exhibit 2" f
identification, was received in evidence.)

57 Mr. HALLORAN. Will the official reporter kindly mark th
series of documents as "Board's Exhibit 3-A, 3-B, 3-
3-D and 3-E" for identification, in duplicate.

(Thereupon the documents above referred to were marke
as "Board's Exhibits 3-A, 3-B, 3-C, 3-D and 3-E" for identi
cation.)

I now offer in evidence what has been marked as "Board's E
hibit 3-A to 3-E" for identification, consisting of the followi
documents:

As Board's Exhibit 3-A, copy of the petition for certificati
of representatives signed by Nathan H. Barker, Manager of Loc
No. 24, dated April 24, 1944:

As Board's Exhibit 3-B, copy of agreement for consent ele
tion, dated April 27, 1944, signed by Albert Fraioli, Assistant Ma
ager of the Union, by F. A. Newman, General Manager of t
Company, and by the Field Examiner, James J. McFadden, a
by A. Howard Myers, Regional Director for the First Region;

As Board's Exhibit 3-C, copy of certification on conduct
election, dated May 5, 1944;

Board's Exhibit 3-D, copy of tally of ballot, dated May
1944;

Board's Exhibit 3-E, report on objections to election, whi
also contains certification of union as the bargaining agent, dat
May 24, 1944.

58 As an explanatory note I would add that the papers referred to in this exhibit concern Case No. I-R-1880.

Trial Examiner BELLMAN. These, I understand, are the matters referred to in part in the stipulation which is in evidence as Board's Exhibit 2?

Mr. HALLORAN. That is correct.

Trial Examiner BELLMAN. Is there any objection to this group of documents being received as identified [handing Board's Exhibits 3-A to 3-E for identification to Mr. Moch]?

Mr. MOCH. I have no way of telling whether these are true copies.

Trial Examiner BELLMAN. Take as much time as you want.

Mr. MOCH. I have not the original petition.

Trial Examiner BELLMAN. Here are the originals [handing papers].

Mr. MOCH. I have no way of telling whether these conform to the originals. I have no reason to think that they are different.

Trial Examiner BELLMAN. Can the originals be produced for the purpose of comparison?

Mr. HALLORAN. Certainly.

Trial Examiner BELLMAN. The hearing will be in recess for five minutes for the purpose of comparing the documents offered, with the original documents in the files.

The hearing will be in recess for five minutes.

(Recess for five minutes, following which the hearing
59 was resumed.)

The hearing is in order.

Have you now had sufficient time, Mr. Moch, for purposes of comparison?

Mr. MOCH. Yes; and as corrected there is no objection.

Trial Examiner BELLMAN. Has the union any objection?

Mr. ROEWER. No objection.

Trial Examiner BELLMAN. The Board agrees that the corrections may be made in longhand on the exhibits?

Mr. HALLORAN. Yes.

Trial Examiner BELLMAN. The documents are admitted in evidence as Board's Exhibits 3-A, 3-B, 3-C, 3-D and 3-E.

(The documents heretofore marked as "Board's Exhibits 3-A, 3-B, 3-C, 3-D and 3-E" for identification were received in evidence.)

Mr. HALLORAN. Will the official reporter mark this copy of letter dated May 25, 1944, and copy of letter dated June 6, 1944, as "Board's Exhibits 4-A and 4-B" for identification.

(Thereupon the documents above referred to were marked as "Board's Exhibits 4-A and 4-B" for identification.)

I now offer in evidence what have been marked as "Board's Exhibits 4–A and 4–B" for identification, the first being a copy of a letter dated May 25, 1944, to A. J. Tower Company, 18 Simmons Street, Roxbury, signed by George E. Roewer, Attorney for International Ladies' Garment Workers' Union, and copy of a letter dated June 6, 1944, to Messrs. Roewer & Reel, signed by John T. Noonan, Attorney for the Company.

60

I am offering the letter of May 25, 1944 as Board's Exhibit 4–A, and the letter of June 6, 1944, as Board's Exhibit 4–B.

Trial Examiner BELLMAN. Will the parties stipulate that these are copies of the documents which they prepared and that they were sent.

Mr. ROEWER. The union will so stipulate.

Trial Examiner BELLMAN. Will the respondent so stipulate?

Mr. MOCH. It is so stipulated.

Trial Examiner BELLMAN. The Board so stipulates?

Mr. HALLORAN. The Board so stipulates.

Trial Examiner HALLORAN. The documents may be admitted in evidence as "Board's Exhibits 4–A and 4–B."

(The documents heretofore marked as "Board's Exhibits 4–A and 4–B" for identification were received in evidence.)

Mr. HALLORAN. The Board rests.

Trial Examiner BELLMAN. Does the union have any evidence which it wishes to offer, in addition to the evidence which has been presented by the Board?

Mr. ROEWER. No, Mr. Trial Examiner. The Union rests.

Trial Examiner BELLMAN. Is the respondent ready to proceed at this time? Or do you wish a short recess, Mr. Moch?

61

Mr. MOCH. I think we are ready to go ahead.

Trial Examiner BELLMAN. The respondent may go forward with his case at this time.

Mr. MOCH. Would you like to have me make a short statement of what the respondent's case is going to consist?

Trial Examiner BELLMAN. If you would like to do that it would be helpful. Will you also indicate, in so doing, the major contentions and points of law upon which you rely?

Mr. MOCH. As indicated by the exhibits which have been offered, there was a consent election agreement signed and executed and an election was held pursuant to that agreement. That election was held on May 5, 1944, after which the ballots were counted, the count at that time standing 116 votes for the union and 114 votes against, with one ballot challenged by the union.

The lists which were made up by the respondent to show the employees who were entitled to vote, were made up, I believe, as

of April 15, or for the week ending that date. I might be mistaken but I think that is correct.

At that time there appeared on our pay roll a lady by the name of Mrs. Jennie A. Kane who, we thought, was ill. We put her on the list and so marked the list.

Trial Examiner BELLMAN. When you say you so marked
62 the list, you marked on the list that she was ill?

Mr. MOCH. That is right. On the first working day after the election one of the employees who voted said that Mrs. Jennie A. Kane was not an employee and so told the company. Subsequent investigatoin showed that Jennie A. Kane was not an employee.

There lies the whole basis for the respondent's contention that the union has not been validly certified as the bargaining agent, because if that vote is thrown out and a challenge as to one ballot, made by the Union, is not sustained, and upon opening that ballot it shows that it is a vote against the union, the election will be a tie. Of course, if the election is a tie, the union has not been certified and has no standing to be certified under the Act as the bargaining representative of the employees in the union.

In order to substantiate these contentions I will call Mr. Elbery.

Trial Examiner BELLMAN. You have presented these matters, Mr. Moch, to the Regional Director?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. The Regional Director made rulings which are set forth in a document which is in evidence?

Mr. MOCH. That is right.

Trial Examiner BELLMAN. What is your contention as to
63 those rulings?

Mr. MOCH. We will contend that that ruling cannot stand in the face of the evidence which we will present.

First, you cannot count the vote of a nonemployee in accordance with the agreement. If you consider the agreement binding you cannot count the vote of a nonemployee.

Any finding by the Regional Director that Mrs. Kane was an employee was so contrary to the evidence presented as to be an arbitrary decision and, therefore, cannot stand.

Even beyond that, the Regional Director made no finding that Mrs. Kane was an employee. His only finding was that the company had waived its right to object to her vote, because of negligence or laches. In that respect there was no evidence that the company was negligent in any regard or that any laches should be attached to it and, therefore, the ruling had no reasonable support in fact.

The agreement stated that only employees were to vote, em-

ployees who were in the unit. On the basis of that agreement, if Mrs. Kane was not an employee, she was not entitled to vote, irrespective of any laches or negligence on the part of the company.

The agreement specified employees, and Mrs. Kane was not an employee and was not entitled to vote. That closed the matter. So that the Regional Director's ruling cannot stand on the agreement.

64 Beyond the agreement, the Regional Director's ruling was based upon a private contract between the Union and the Company and, irrespective of any ruling on that agreement, we contend that if Mrs. Kane was not an employee, she would not be entitled to be included, and her vote—or whatever means you have of designating a majority—if she was not an employee at the time, would not be entitled to be considered because it would, in effect, vitiate the provisions of the National Labor Relations Act.

This is a proceeding charging a violation under an Act that provides that representatives must be chosen by employees, and no private agreement can vitiate that. No private agreement can make it possible to choose a bargaining representative by a vote of a group of employees and nonemployees.

Under the Act it is up to the Board to protect the rights of the employees that vote "No." Even if the company and the union had said in the consent agreement that Mrs. Kane was entitled to vote, if she was not an employee, no bargaining agent could be certified under the Act, if her act was controlling in the determination of the majority.

Mr. HALLORAN. I do not object to an opening statement setting forth what counsel intends to show, but I think we should not have final argument at this time.

Mr. MOCH. I was asked our contention as to this ruling
65 of the Regional Director.

Trial Examiner BELLMAN. Have you anything further?

Mr. MOCH. I am making a rather long statement on this because I know that the Board and the union feel that we should not go behind the ruling of the Regional Director.

This is probably a very important portion of the case and I am trying to put it as clearly as I can.

In substantiation of my point of law that Mrs. Kane's vote cannot be counted because the Act would be vitiated if it were counted, there is a case, if you wish me to give cases to you?

Trial Examiner BELLMAN. Later you can argue this fully. If you have anything to point up what the company's general contention is, you may go ahead now.

You asked to make an opening statement, and I had this one question on which I wanted to get your general position.

Mr. MOCH. I will ask Mr. Elbery to take the stand.

JOHN J. ELBERY, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MOCH:

Q. Your name, Mr. Elbery?—A. John J. Elbery.

Q. Your position with A. J. Tower Company?—A. Factory superintendent.

66 Q. You are in charge of the entire plant?—A. That is right.

Q. In Roxbury?—A. That is right.

Q. You are acquainted with the election which was held on May 5?—A. Yes.

Q. That was on a Friday?—A. That is right.

Q. Do you run the plant on Saturday or Sunday?—A. No.

Q. Did you run the plant on Saturday, May 6th?—A. Not the stitchers.

Q. Or on Sunday?—A. Not the stitchers.

Q. No stitchers worked on Saturday or Sunday?—A. That is right.

Q. Monday was the first day after the election that the stitchers worked?—A. That is right.

Q. Mrs. Jennie Kane was a stitcher?—A. Yes.

Q. On that Monday did one of the stitchers come to you with any information concerning the election?—A. That is right. She did.

67 Q. What stitcher was it, do you remember?—A. I do not recall at the moment.

Trial Examiner BELLMAN. This would be Monday, May 8th?

The WITNESS. The 7th, I believe.

Mr. MOCH. It is the 8th.

The WITNESS. That is right.

Q. On Monday what did this employee tell you?

Mr. HALLORAN. I object.

Trial Examiner BELLMAN. I will hear you, Mr. Halloran.

Mr. HALLORAN. Whatever this employee said would be hearsay, may it please the Trial Examiner.

Trial Examiner BELLMAN. Are you ready to present the employee who made the statement, Mr. Moch?

Mr. MOCH. No, sir.

Trial Examiner BELLMAN. Is the employee available?

Mr. MOCH. At the moment I do not even know who she is.

Trial Examiner BELLMAN. This is your witness. You have some idea surely.

Mr. MOCH. An employee came up to the witness and made a statement to him which he can relate.

Trial Examiner BELLMAN. I will hear his testimony. After it is in I will entertain a motion to strike.

Mr. HALLORAN. My second objection is that if the purpose of this interrogation is to go behind the Regional Director's
68 certification, I should object to it in all subsequent questions pertaining to the same subject matter.

My ground for that is that the agreement for the consent election was entered into by the parties.

Mr. MOCH. What does counsel mean by "go behind the Regional Director's certification"?

Mr. HALLORAN. I think that language is understandable.

Trial Examiner BELLMAN. If this line is for that purpose, you will go behind the Regional Director's certification?

Mr. MOCH. I think that is probably what it is.

Trial Examiner BELLMAN. If this line is for that purpose, you may go ahead, Mr. Halloran, and state the Board's position.

Mr. HALLORAN. In the agreement for the consent election executed by the union and by the company and signed by the Regional Director and the Field Examiner, for the Board, it is provided that said election shall be held in accordance with the National Labor Relations Act, the Board's rules and regulations, and the customary procedures and policies of the Board, and it is further provided that the determination of the Regional Director shall be final and binding upon any questions, including questions as to the eligibility of the voters, raised by any party hereto, relating in any manner to the election.

The parties having entered into such an agreement, I submit to the Trial Examiner that the Regional Director
69 shall pass upon the eligibility of any voters and such determination by the Regional Director is absolutely binding on the parties, and any attempt to go behind a decision subsequently made by the Regional Director relative to the eligibility of the voters—such decision being based upon this agreement for a consent election—is a nullification of the entire purpose and intent of the agreement for consent election. Can parties enter into such an agreement and subsequently at their pleasure declare that such an agreement means nothing?

I direct your Honor's attention to a decision in the sixth circuit in the case of National Labor Relations Board v. Capitol Greyhound Lines, reported in 13 L. R. R. 729, decided January 31, 1944. Certiorari was denied by the Supreme Court on June 12, 1944. The Court held in effect, as follows:

"We find that the Regional Director's ruling was neither arbitrary nor capricious. In the absence of such conduct, we feel ourselves bound by the terms of the Director's determination to the same extent as a Court is bound by an agreement to abide by an

arbitrator's award. To hold otherwise would permit an employee deliberately to ignore binding commitments embodied in a consent agreement; would open the door to subterfuge for hampering and delaying a final determination of a bargaining
70 representative; and would tend to defeat rather than to effectuate the policies of the Act."

I press my objection on behalf of the Board, may it please the Trial Examiner, and ask that all evidence which tends to go behind the Regional Director's certification, be excluded.

Mr. ROEWER. The union likewise objects to this line of inquiry and bases its objection on the finality of the Regional Director's decision.

Trial Examiner BELLMAN. If the vote of Jennie Kane, involved in this, were not counted, it would leave the election in the position of being 115 to 114?

Mr. HALLORAN. That is correct.

Mr. MOCH. With one vote not counted.

Trial Examiner BELLMAN. In ordinary course that vote might determine the result of the election.

Mr. MOCH. Assuming that we have knowledge of how Jennie Kane voted.

Trial Examiner BELLMAN. She was not challenged at the polls?

Mr. HALLORAN. That is correct. May I say one further word on the point, which may or may not assist?

Trial Examiner BELLMAN. Yes.

Mr. HALLORAN. The finding in the sixth circuit in the Capitol Greyhound Lines case shows very clearly that in the
71 absence of arbitrary or capricious conduct on the part of the Regional Director, the Court must accept the Regional Director's finding.

When requested by you to set forth the position of the company as to what evidence the company intended to present, I observed that my brother made no contention that he was going to show that the action of the Regional Director was capricious. He indicated that he might show that it was an arbitrary decision merely because the Regional Director passed upon that vote, which in itself is not an indication of being arbitrary.

Trial Examiner BELLMAN. I am trying to visualize this whole problem.

How could the Regional Director throw out that particular vote if it was not challenged at the polls? Was it segregated in any way?

Mr. MOCH. No. We have evidence showing how she voted.

Trial Examiner BELLMAN. What about the secrecy of the ballot?

Mr. MOCH. She is not an employee.

Trial Examiner BELLMAN. In other words, you contend that even if she participated in the election, and cast a ballot which was not challenged, and hence was not segregated, and went into the sum total of the ballot undifferentiated, that inasmuch as she was not an employee and you found out afterwards how she voted, the Regional Director then should have subtracted her vote?

72

Mr. MOCH. Yes, sir.

Trial Examiner BELLMAN. Subtracted her vote from the vote of the side that she voted for?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. You found out, according to your contention, that she voted for the union or against the union?

Mr. MOCH. For the union.

Trial Examiner BELLMAN. And, therefore, the Regional Director, on your representation to him, after the election was over, should have subtracted one vote from the 116 for the union?

Mr. MOCH. That is right.

Trial Examiner BELLMAN. It is your contention then that, having failed to do so, the election for certification is invalid for what reason?

Mr. MOCH. Because it was not in accordance with the consent agreement.

Trial Examiner BELLMAN. Assuming the Regional Director to be the final authority, you say it was not in conformity with the explicit provisions of the consent agreement?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. What explicit provision is involved?

73

Mr. MOCH. The agreement stipulated that the election was to be held among the employees and that the unit—the employees of which were entitled to vote—was composed only of employees.

Let me take an example. Say that Mrs. Kane on May 1 or the latter part of April, had gone over to some other company and started to work and worked there eight hours a day and that on the day of the election she came in and voted. We did not know where she was working. We had no idea where she was working. If that should have been the fact I don't think anybody would have made any contention that we should ascertain how she voted, or that there would be any question that that vote should be thrown out.

Mr. ROEWER. May I say a word?

Trial Examiner BELLMAN. Yes.

Mr. ROEWER. Of course, the Trial Examiner has in mind that the eligibility list was furnished by the company and they rep-

resented to the union that Mrs. Kane was an employee and that other names on the list were the names of people in the employ of the company.

Naturally the company is in a position to determine the eligibility rather than the union. The union relied on the eligibility list which was furnished by the company prior to the election. At the time of the election, although the company
74 had an opportunity to challenge anybody, it did not challenge Mrs. Kane. And they represented she was entitled to vote at the time the list was made out.

Trial Examiner BELLMAN. Your position is that you did not know at the time of the election that she was not an employee.

Mr. ROEWER. Yes.

Mr. MOCH. That argument simply goes to whether the Regional Director's ruling is correct, not as to whether or not you can go behind it. It is our contention that we had no way of knowing that she was not an employee at that time.

Mr. HALLORAN. We do not agree with everything counsel has said. We do not agree that she was not an employee at that time.

Trial Examiner BELLMAN. The Regional Director's ruling was not based on that particular question, however. It seems to me the Regional Director's ruling did not resolve that particular point, as to whether or not she was an employee, but made certain other findings.

Mr. HALLORAN. We do not agree that the Company had no knowledge, as has been so emphatically set forth by counsel.

Trial Examiner BELLMAN. Suppose we let counsel for the Company stick to this brief recapitulation of position.

Mr. MOCH. My first point, that I elaborated on before, was that according to the agreement Mrs. Kane should not have been
75 allowed to vote if she was not an employee, according to the agreement itself.

Even beyond that, and assuming that the Regional Director's ruling is binding, and this is a proceeding under the National Labor Relations Act, and that ruling was a ruling based on a private agreement which secured no vitality from the National Labor Relations Act or from any public body it was a private agreement and nothing in that agreement or any rules based on it can vitiate the labor relations act, which states that in order to certify a bargaining representative, the bargaining representative has chosen and must be chosen by a majority of the employees. The only way this union can become the bargaining agent is by being the representative of the majority of a group of employees. If the group consists of employees and nonemployees, the Act is going to be vitiated.

Counsel for the Board has cited the Capitol Greyhound case.

If you wish me to go into that I can distinguish between that case and the present case. I also have a board case which indicates that a ruling of the Regional Director cannot be used to violate the provisions of the National Labor Relations Act.

Another case which substantiates the contention I made a moment ago is one in which the Third Circuit Court held that this agreement does not have any vitality under the act.

Trial Examiner BELLMAN. Getting back to the Capitol
76 Greyhound case, do you contend that the rulings as made by the Regional Director are in any way arbitrary or capricious?

Mr. MOCH. I do not want to say that they are capricious, but I think that they are arbitrary inasmuch as the ruling that was made is not substantiated by any competent evidence. I would go so far as to say that they are not substantiated by any evidence.

Trial Examiner BELLMAN. I think you might as well go ahead and present your argument and your cases now, because it appears from the way the issues are shaping up, that the contentions might as well be fully stated now as some time later.

Mr. MOCH. The Board, I believe, has the duty and the right to uphold the rights of those employees who voted "No" in the election, those employees who do not want the union.

Here we have a case where there was a very close election. It is the duty of the Board to protect the rights of those who do not desire to have this union represent them.

As I stated before, the act itself provides that the representatives must be designated by a majority of the employees, and no group of employees and nonemployees can be used to determine a majority to represent employees. That is really the basis of the contention, that the ruling of the Regional Director cannot vitiate the Act. That is really the ultimate reason.

77 In the Automatic Products Company case, 40 N. L. R. B. 941, the union and the employer entered into an agreement for a consent election. In connection with that the Regional Director drafted and sanctioned a provision which provided that if the union lost the election it should refrain from seeking recognition for a year. It lost the election and came back and sought recognition. The Court said it would not enforce a provision where the enforcement would defeat rights guaranteed under the Act. Our contention is that the enforcement of this ruling of the Regional Director would likewise defeat rights guaranteed by the Act.

In Sun Ship Employees Association v. N. L. R. B., decided in the Third Circuit Court of Appeals, recorded in 13 L. R. B. 583, there was a consent agreement. Objections were heard by the Regional Director and a determination made by him, and the

Board refused a rehearing. The side that was injured took it to Court, and the Court refused jurisdiction. In doing so it said there was no Federal statute involved, that the consent agreement derived no vitality from any statute or public body, that it was simply a private agreement. Hence there was no statute involved and it could not take jurisdiction.

So that this agreement from which the ruling of the Regional Director stems, cannot be said to be a determination under
78 the statute; it cannot be used to vitiate the provisions of a statute which makes certain specific provisions and guarantees the rights of all employees.

Our contention under this portion of my argument is that these 115 employees—or at least 114 employees—who would have voted against the union, cannot have their bargaining rights placed in the hands of this union on the vote of a nonemployee.

To distinguish the Capitol Greyhound case from the present case: In that case—and I am speaking from memory now—there was a consent agreement that a list of bus drivers should be made up some time in July—July 15. About August 1, one Nolan was employed as a bus driver. The list was made up by the company from the pay roll of August 15 instead of July 15. At the election that was held I think no objection was made to Nolan. Thereafter the company filed objections to the conduct of the election and the Regional Director overruled the objection.

There was a hearing similar to this one in which a Trial Examiner heard the testimony and threw out the vote of Nolan. Incidentally, I think Nolan testified that he voted for the union.

Incidentally, the union and the company agreed that the list would be the sole and exclusive list.

In the Capitol Greyhound case the Board overruled the Trial Examiner and the decision of the Board was appealed to
79 the Court.

You will note that there are at least three distinctions. First of all, Nolan was employed in the unit at the time of the election, exactly the opposite of the present case, and this is most important. We contend that Mrs. Kane was not an employee and was not in the unit.

Secondly, in the Capitol Greyhound case the list was the sole and exclusive list. No such agreement existed here. In fact we wanted such an agreement and the union would not agree.

Another important distinction was that in the Capitol Greyhound case the Company was negligent in making up the list as of the wrong pay-roll date, and the facts were peculiarly within their knowledge. They knew that Nolan was employed by them

after the time that the list was made up. They made up the list as of the wrong date.

You can find nothing in this case to indicate that the fact that Mrs. Kane was not an employee, was peculiarly within the knowledge of the company or that they were in any way negligent in not finding it out. I think that rather effective distinguishes the Capitol Greyhound case.

Mr. HALLORAN. If I might interpose at this moment, did I understand you to say that the list that was turned over to the Board in the instant case was not the sole and exclusive list of eligible voters?

80 Mr. MOCH. There was no such agreement between the union and the company.

Mr. HALLORAN. Isn't it a fact that the Company turned just one list over to the Board in the present case?

Mr. MOCH. That is correct, but there was no agreement that that was to be the sole and exclusive list.

Trial Examiner BELLMAN. Did anybody contend that another list should be used during the election?

Mr. MOCH. No.

Trial Examiner BELLMAN. No second list was placed before the board?

Mr. MOCH. No.

Trial Examiner BELLMAN. The Board was not requested to use a second list?

Mr. MOCH. No.

Trial Examiner BELLMAN. In the actual operation of the election that was the only list that was used?

Mr. MOCH. Correct.

Trial Examiner BELLMAN. That is the list referred to in the document already in evidence, the list which the company prepared?

Mr. MOCH. Correct.

Mr. HALLORAN. You will agree that the consent election agreement included a clause that at a date fixed by the Regional

81 Director the employer should furnish to the Regional Director an accurate list of all the eligible voters together with a list of the employees, if any, specifically excluded from eligibility?

Mr. MOCH. Certainly. In the Capitol Greyhound case, which I am distinguishing from the present case, in addition to that, the parties agreed that that list would be considered the sole and exclusive list. There was no such agreement here. Although we tried to get the union to agree to that, they absolutely refused to do so.

Trial Examiner BELLMAN. There appears to be no disagreement

as to how this list was made up, as to its being the only list and as to its being the list furnished in conformity with the agreement for the consent election?

Mr. ZACK. My name is Samuel C. Zack, and I am Regional Attorney.

In view of the question raised by the Trial Examiner as to whether or not it is the respondent's contention that the action of the Regional Director might be termed capricious or arbitrary—the Examiner asked the attorney for the company whether or not they were raising that—I recall that counsel for the company stated that he did not contend it was capricious.

In connection with whether or not the action of the Trial Examiner might have been arbitrary in connection with his ruling on the "R" case, the fact is there were at least two
82 conferences—and probably three—conducted by the Regional Director, at which other counsel for the company, Mr. Noonan, was present representing the company; counsel for the union was present as well as, I think, the witness and other representatives of the company.

The matter of the issues raised by the Company's protest was gone into very thoroughly at both of those conferences—or at the three conferences if three were held. The Regional Director assigned an examiner out of this office to conduct an investigation for him and to interview all of the necessary witnesses. Those investigations were carried on at his direction in order to ascertain the true state of affairs, so that he might, in rendering his decision, under the consent election agreement have before him all of the pertinent facts and arrive at a proper conclusion.

I submit that the action of the Regional Director in affording an opportunity to the parties to raise objections to his report, certainly does not indicate that his actions were in fact arbitrary in arriving at the determination as set forth in the report on objections.

I also want to state, as stated by Mr. Halloran, that we do not agree with the statement of counsel for the company that this Mrs. Kane did vote for the union. The fact is that counsel for the company could have this woman available here. They
83 have stated, in any event, that she is not to be presented at the hearing today.

Mr. MOCH. I have not stated that.

Mr. ZACK. I thought you stated that she would not be here to testify.

Mr. MOCH. I have not as yet.

Mr. ZACK. We do not agree that she voted for the union. There is no evidence before the Trial Examiner that she did so vote.

I might point out too—and I will refer you to the Regional Director's report on objections—that, as a matter of fact, having in

mind the language of the Capitol Greyhound case, where the Court stated that the facts with relation to the employee as a person in question, were peculiarly within the knowledge of the company, it has appeared that the election in this case was held on May 5. The company was notified—and I think Mr. Noonan admitted—that on May 1 Mrs. Kane had made application for employment elsewhere. Certainly four days before the election was held the company had notice with reference to a possible change of status of this woman.

Mr. MOCH. We do not admit that. Mr. Noonan never admitted that.

Mr. ZACK. Whether or not you admit it, the Director's report states it.

Trial Examiner BELLMAN. The Director's report is in evidence and I can tell by reading the Director's report.

84 Mr. ZACK. I call your attention, Mr. Trial Examiner, to page 3 of the Regional Director's report on objections, the second paragraph on that page [reading]:

"A Notice To Employer of Claim Filed was sent to the company by the U. S. Employment service on May 1 1944, the same day on which the Company submitted 'a complete list of employees of the A. J. Tower Company on the payroll of April 21, 1944, who were in the unit designated in the consent agreement for an election to be held May 5, 1944.'"

Even though they contend that they did not receive it, it may be pertinent to say here that Mr. Noonan said he would not deny that they received it. Certainly in the ordinary course of the affairs of the United States Post Office you have a right to assume that that notice was delivered to the company.

I am not raising the issue. I am merely pointing out that the distinction made between this case and the Greyhound case is not a valid one, because we contend that the examination made by the Director shows that four days before the election the Company knew of a possible change of her status, and at no time prior to the election did they take any steps to apprise any of the parties of a possible change or to advise us. On the very day of the election, in accordance with the terms of the agreement, repre-

85 sentatives were present and did not challenge this Mrs. Kane when she appeared.

The distinction attempted to be drawn is not valid, and, in view of all the circumstances, I submit the Examiner ought not to hear any testimony in the absence of any showing of capricious or arbitrary action on the part of the Director. You should not go into any of the facts in view of this consent election agreement entered into by the parties. To do so would be to make a mere sham of the consent election conducted by the Board, a type of

election which is carried on through all of our regions, and this procedure, with the exception of one or two instances, has never been challenged. It was challenged once in the Sun Shipbuilding case and that was kicked out of court. It is now in the State court and no decision has been made. Certainly the Federal court would have nothing to do with it.

In the discussion of the decision they say it is an agreement between the parties to which the Board is a party. The Regional Director and the Field Examiner acquiesced in it. It is not correct to say that it is a private agreement to which the Board is not a party. We are a definite party. The signature of the Director is on there as the officer of the Board who agreed to it and the signature of the Field Examiner is on there. It is part and parcel of our procedure. If there is any merit to this procedure, which has been in effect in dealing with labor relations
86 throughout the country, by which the problems of labor and management have been settled now for almost nine years, I say it is valid and ought to be upheld and the contention made by Mr. Halloran ought to be sustained.

Trial Examiner BELLMAN. To clear up one point, Mr. Moch, you are not claiming that the Regional Director's decision was capricious?

Mr. MOCH. Only arbitrary, so far as the finding of laches on the part of the company is not sustained by any evidence.

Trial Examiner BELLMAN. You are not contending that the Regional Director was arbitrary in his manner of conducting the investigation?

Mr. MOCH. No.

Trial Examiner BELLMAN. Or in his failure to give the company full opportunity to present all of the evidence which it wished to present to him?

Mr. MOCH. Not in any respect. It was very fair and very impartial. Everything was fine in that respect. He gave us every opportunity. There was nothing arbitrary about that at all, not a thing.

Trial Examiner BELLMAN. Your contention is that the finding that the Regional Director made, that you should have challenged this vote at the election rather than to have made your contention later, is an arbitrary ruling?

Mr. MOCH. There is nothing whatsoever to support the
87 finding of negligence on the part of the company.

Trial Examiner BELLMAN. Is that the only sense in which you are making the contention that there was an arbitrary action?

Mr. MOCH. That is right. So far as the method of procedure, there is nothing arbitrary about that at all.

Mr. Zack claims that the Capitol Greyhound case is not dis-

tinguishable because Mrs. Kane was an employee. I submit that my contention is as good as his in that there is no evidence before you on which to decide one way or another.

As to the consent agreement, this procedure which we are now challenging was overturned by the Court in the Automatic Products Company case. In the Sun Shipbuilding case, contrary to what I understood Mr. Zack to contend, the Court said that the action of the Regional Director was no different than the action of a minister or other private individual.

Evidently we are arguing here over technicalities as to whether we should go ahead or whether we should not go ahead, because of procedure.

To all intents and purposes this is a big, fine, self-respecting union. I should think if they want to bargain for the employees of the A. J. Power Company, they would not be placing their entire case upon the vote of somebody who has not worked in
88 the plant since March 24, 1944, who has stated in more than one instance, in writing, that she does not intend to work there, that she has left and she will never, in all probability, be a part of the unit for which these people are bargaining and could not be for the reason that she is not physically capable of working. If this union really wants to represent the employees of the Tower Company, I should think that they would not want to do so on such a tainted vote. If they can show a majority, let them show it.

Trial Examiner BELLMAN. I think we are getting a little off the track here.

Mr. ROEWER. I just want to say this, that according to our record this woman has informed us that she did intend to return to work; she had not given up her job at the Tower plant and she is still a member of the plant. Moreover, because of interference on the part of supervisory help within the plant—and we have evidence of that—against this union, we are insisting upon our right of certification under this election.

Trial Examiner BELLMAN. That is getting off onto matters that are not before me at all.

Mr. ROEWER. That is right.

Trial Examiner BELLMAN. You gentlemen will have to watch your tendency to go afield and to dig into a substrata of misunderstanding and resentment, because those are not in issue here.

If the respondent went ahead with the presentation of
89 evidence, what, in general and as briefly as possible, would you want to establish by evidence?

Mr. MOCH. Solely that Mrs. Kane at the time of the election was not an employee and how she voted. There is also the question of the other ballot.

Trial Examiner BELLMAN. It seems to me you cannot bring the other ballot into the picture until there is a decision indicating whether the other ballot would be material in that it could affect the result of the election. You are not going to put in any evidence about that other ballot, are you?

Mr. MOCH. Unless you want to hear the whole case at this time. In order to show that the union here is not the bargaining agent, that ballot would have to be counted. If you throw out this vote they have only 114 votes.

Trial Examiner BELLMAN. It seems to me if you had a ruling which would reduce the vote to 115 to 114, then the challenged ballot would be material. It is not a matter for us to try to determine at this hearing whether the challenged ballot should be opened. That is not a matter before the Trial Examiner.

Mr. ZACK. There is no challenged ballot here. There is no way of determining which ballot this Mrs. Kane cast, even though you were inclined to go into it.

Trial Examiner BELLMAN. I believe there is a challenged ballot which has been segregated. From the pleadings there seems to be no challenged ballot which would be material
90 in determining whether it was a tie election or one won by the union, if Mrs. Kane's vote were deducted from the vote received by the union. It seems to me that the question of how that challenged vote was cast certainly does not come before me at this time. If anybody has any contention to the contrary on that point, I would like to have it.

You want to show that at the time of the election Mrs. Kane was not an employee?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. And that she voted for the union or against?

Mr. MOCH. Voted for the union.

Trial Examiner BELLMAN. Do you propose to introduce Mrs. Kane?

Mr. MOCH. I do not expect we have to. She is in poor health, and, as far as we are concerned, we do not think we should ask her to come down here. If the Board wishes to subpoena her, the Board has that privilege.

Trial Examiner BELLMAN. Do you propose to indicate that the respondent has any substantial reason for believing that Mrs. Kane voted for the union?

Mr. MOCH. Oh, yes.

Trial Examiner BELLMAN. Are there any other matters that any of the parties want to place before the Trial Examiner for his consideration? I believe I have the general
91 problem before me shaped up as part of my ruling. If

there is anything you want me to consider on the general question, I would like to have it now.

Mr. HALLORAN. May I say one further word on the remaining issue before the Trial Examiner at the moment?

It appears from what counsel has said that the respondent is not contending that the finding of the Regional Director was either arbitrary or capricious. That being so, I submit that the evidence he proposes is clearly not admissible, because we are limited by the decision in the Sixth Circuit in the Capitol Greyhound case which, by inference at least, was approved by the United States Supreme Court when it denied certiorari.

If it is true—and I do not think it can be denied because it comes practically out of the mouth of my brother—that the company is not contending that the finding was arbitrary or capricious—the question of Mrs. Kane's vote is not before us today. The question is whether the Regional Director's conduct was arbitrary and capricious. If that is so, I see no necessity for going further with any evidence pertaining to the subject matter.

Trial Examiner BELLMAN. I want a little extra time this noon to study these issues and especially to study these stipulations and documents before me.

Is there anything else?

92 Mr. HALLORAN. In connection with the Automatic Products Company case cited by my brother, it is not in any sense in point on the question raised here today.

Trial Examiner BELLMAN. The hearing will be in recess until two o'clock.

(At 12:30 p. m. a recess was taken until 2 p. m.)

93 AFTER RECESS

(At 2 p. m. the hearing was resumed pursuant to the taking of recess.)

Trial Examiner BELLMAN. The hearing will be in order. During my rather careful study of the documents in evidence and the contentions of the parties, which I made during the lunch recess, one or two questions came to mind that I would like to get cleared up now.

There is reference in Board's Exhibits 2 and 3, to the objections to the election filed by the respondent on May 9, 1944. The objections themselves are not in evidence. Does anyone intend to produce the objections?

Mr. HALLORAN. The Board does not.

Trial Examiner BELLMAN. Apparently those objections were in the form of a letter. The letter is referred to in the Regional Director's report on objections. If the parties want to stipulate that the letter in substance contains what the Regional Director's

report on objections states that it contains, that might be one way of getting in evidence just how the objections were phrased, or you might put in the letter itself.

Mr. Moch. I have not two copies of the letter. I have one copy of the letter. If you will allow me to, I will furnish you with a copy.

Trial Examiner Bellman. Off the record.

94 (Discussion off the record.)

On the record.

I understand the document is available and copies are being made and you will introduce that as part of your evidence?

Mr. Moch. Correct.

Trial Examiner Bellman. The other matter refers to the eligibility of voters and to the pay roll of April 21, 1944, referred to in the consent election agreement. Was that the pay roll for the period ending April 21?

Mr. Halloran. That is correct.

Mr. Moch. Yes.

Trial Examiner Bellman. How long is the respondent's pay roll period?

Mr. Moch. One week.

Trial Examiner Bellman. Will the parties stipulate that the pay roll period is one week?

Mr. Halloran. The Board so stipulates.

Mr. Moch. All right. May I correct one statement that I made this morning. I referred to the pay roll period of April 15. April 21 is the period I meant.

Trial Examiner Bellman. This proviso would mean employees who appeared on the pay roll for one week before April 21 and ending April 21.

95 Off the record.

[Discussion off the record.]

On the record.

Does the fact that the pay roll date, April 21, 1944, was used, mean that the employees who appeared on the list of eligible voters were employed during the previous week?

Mr. Moch. No. During the week prior to the previous week. The week in which the employees worked would start April 7, 1944.

Trial Examiner Bellman. It is the practice to hold a week's pay?

Mr. Moch. Yes, sir.

Trial Examiner Bellman. Persons paid April 21 were paid on April 21 for the work they had performed two weeks previously and coming down to the week previous?

Mr. Moch. Yes, sir.

Trial Examiner BELLMAN. Is there any objection to that statement as to how the pay roll was made up? (No response.)

Those two questions are cleared up. The question which remains is one of ruling on the extent to which the respondent will go ahead with the type of evidence it wants to produce.

I have given this matter careful consideration and I will give you my ruling at this time in a general way, so that you can be guided accordingly.

96 In view of the contentions of the parties and because of certain language in some of the recent Board decisions, particularly in O. U. Hoffmann, Case No. 4–C–1375, decided in March of 1944, I am going to permit the respondent to go ahead with evidence as to Mrs. Kane's employment status at the time of the election, as to when it gained knowledge of that status and as to any information it may have as to how Mrs. Kane voted in the election.

I believe that includes all that you said you wanted to present evidence on. And I can specify one matter which you did not stress, namely, when the respondent gained knowledge of Kane's employment status.

Does that ruling embrace all that you intended to cover?

Mr. MOCH. Yes, sir.

Mr. HALLORAN. You will note our objection.

Trial Examiner BELLMAN. I want to keep the hearing to these issues and I am going to give the Board a standing objection and exception to the entire line. Likewise I am going to give the union a standing objection and exception to the entire lines developed through this evidence.

The witness will resume the stand.

JOHN J. ELBERY, the witness on the stand at the time of recess, resumed the stand and testified further as follows:

97 Direct examination (continued) by Mr. Moch:

Q. You have given us your name and your position?—A. Yes.

Q. Do you recall that the election was held on Friday, May 5, 1944?—A. Yes.

Q. And that no stitchers worked on the following Saturday or Sunday?—A. Yes.

Q. I think that is as far as any answers of yours were concerned? Is that right. A. I believe so.

Q. I ask you if any employee brought to your notice anything which he or she thought was out of line in the election?

Trial Examiner BELLMAN. Suppose you begin with Monday, May 8.

Q. This employee came to you?—A. Yes.

Q. You do not recall now who it was?—A. No, I don't.

Q. What was the nature of the communication or conversation you had?

Mr. HALLORAN. I object on the ground of hearsay.

Trial Examiner BELLMAN. I will hear the evidence first.

98 It may or may not have a bearing.

Mr. HALLORAN. My objection is based on the ground that the testimony sought to be elicited from the witness is hearsay. My objection at the moment is not as to the substance. The witness is asked as to what some unidentified person, not a party to this proceeding, told him.

Trial Examiner BELLMAN. Objection overruled.

A. This party came to me and objected to the vote of this Jennie Kane.

Q. Mrs. Kane was a stitcher?—A. That is right.

Trial Examiner BELLMAN. In other words, some employee whose name you cannot remember came to you and said she did not think Jennie Kane ought to vote?

The WITNESS. Yes, sir.

Trial Examiner BELLMAN. Is that all that this employee said?

The WITNESS. In effect that is just what she said.

Trial Examiner BELLMAN. The testimony may stand.

Q. Didn't you ask her why she thought Jennie Kane should not vote?

Mr. HALLORAN. I object on the ground that it is leading.

Q. Did you ask this employee as to the basis of her objection?—A. I did.

Mr. HALLORAN. I object to the question. If counsel de-

99 sires to testify he should take the stand.

Trial Examiner BELLMAN. Objection overruled.

Q. What is your answer?—A. I did ask her.

Q. What answer did you get?

Trial Examiner BELLMAN. Are you offering this as probative?

Mr. MOCH. Not at all.

Trial Examiner BELLMAN. Are you offering it on the question of whether Mrs. Kane was an employee or not?

Mr. MOCH. No, sir.

Trial Examiner BELLMAN. Merely on how the company became interested in the question?

Mr. MOCH. That is right.

Trial Examiner BELLMAN. I will admit it on that basis.

A. This employee stated that in her opinion Jennie Kane didn't work as an employee of the company.

Q. What was the last time Mrs. Kane actually worked in the plant?—A. March 24, 1944.

Q. As far as you know did she ever appear in the plant after that time until the date of the election?—A. No; she did not.

Q. Did you help to prepare the list of employees to be
100 given to the Board?—A. Yes.

Q. In connection with the election?—A. That is right.

Q. Mrs. Kane's name was on that?—A. Yes.

Q. Did you have to hurry considerably to get that list prepared by the time the Board wanted it to be presented to them?

Mr. HALLORAN. I object to the form of that question.

Trial Examiner BELLMAN. Make your questions nonleading, please.

Q. Mrs. Kane's name was on the list?—A. That is right.

Q. Was there any notation as to whether or not she actually worked?—A. I beg your pardon?

Q. Was there any notation on that list as to whether or not she actually worked during the period for which the list was made up?—A. No. She was simply marked as absent.

By Trial Examiner BELLMAN:

Q. Did you put any notation on this list beside Mrs. Kane's name and, if so, what notation did you put?—A. I wouldn't want to say right at the moment. I would have to refresh myself
101 by looking at the list [consulting paper].

Q. Have you refreshed your recollection?—A. Yes.

Q. Can you tell me what notation was put on the list?—A. The notation was that she was out sick.

By Mr. MOCH:

Q. Did the company have any reason to suppose that the facts were any different from that notation?—A. No.

Q. After this employee made the remark to you that she objected to Mrs. Kane's voting, did you or did you not investigate as to whether or not Mrs. Kane actually had quit?—A. I did.

Q. Could you tell us about that investigation?—A. Yes. I went down to the United States Employment Office on Beacon Street to ascertain if she had applied or put her name on file for another position.

Q. What did you find?—A. I found that she had.

Q. Do you know as of what date she put her name on file there?

Mr. ROEWER. The document is the best evidence, I suppose.

Mr. MOCH. It is pretty difficult to run around and get all those documents.

102 By Trial Examiner BELLMAN:

Q. Did you explain to the representative of the United States Employment Service who you were?—A. Yes.

Q. Were you talking to an official of the Employment Service?—

A. I do not know whether it was an official. It was somebody in that particular department in the office that had to do with that work.

Q. Do you know the name of the individual?—A. I do not, sir; no.

Q. Do you know whether or not that individual referred to any records?—A. Yes.

Q. You can state what information was given to you in that interview.—A. A slip was found. This form was found in the file, on which Mrs. Kane had noted the fact that she had left the employ of the A. J. Tower Company and had given her reason for leaving.

By Mr. Moch:

Q. State whether or not anybody informed you that Mrs. Kane had put her name on a list as available for work?—A. Yes.

103 Q. She had?—A. Yes.

Q. And as of what date?—A. Right at the moment I do not recall.

Q. Was it prior to May 5?—A. I am sorry. I cannot say definitely.

Q. You went down to the United States Employment Office on the following Monday?—A. I went down on Monday, May 8.

Q. You do not now recall whether your informant at that office told you whether Mrs. Kane had put her name down any time prior to that Monday?—A. I know it was before.

Q. Do you know whether she put it down before or after the election?—A. I know it was before the election.

Q. Did you find out anything further during your investigation beyond the fact that she had put her name down as available for work?—A. I don't know what you mean.

Q. Were you informed that Mrs. Kane applied for any unemployment compensation?—A. I understand that she did.

Q. You were so told?—A. Yes, sir.

Q. After receiving that information state whether or

104 not you went back to your office and determined whether or not you had received notice of that application?

Mr. Rohwer. I think counsel ought not to lead the witness.

Trial Examiner Bellman. Objection sustained.

Q. After finding out the information you have just told us, did you return to the plant?—A. I went back to the plant.

Q. Did you make an attempt to ascertain if the company had received any notice of this application?—A. I did. I went through the files and found the form.

Q. Is this a photostatic copy of the form?—A. Yes, sir.

(Thereupon the photostat above referred to was marked as "Respondent's Exhibit No. 1" for identification.)

Mr. Moch. I offer this as the respondent's first exhibit.

Trial Examiner Bellman. What date was it that you found this in your file [referring to Respondent's Exhibit 1 for identification]?

The Witness. After I came back from the United States Employment Office on May 8.

Trial Examiner Bellman. Is there any objection to this document which has been marked as "Respondent's Exhibit No. 1" for identification?

105 Mr. Moch. I intend to offer it.

Mr. Halloran. The Board has no objection to the receipt of the document in evidence so long as by not objecting to its admission the Board is not waiving any rights under the general objection to the entire line.

Trial Examiner Bellman. I assure you and I assure the union that you have a standing objection to all testimony and all documents put in on this matter, under the ruling I gave you orally.

If you make your objection specifically as to matters of admissibility and other things of that sort, you will not be waiving your position in any sense.

(To witness) Is this a type of document which you receive frequently?

The Witness. Yes.

Trial Examiner Bellman. It is a general form sent to the company whenever an employee fills it out?

The Witness. Yes.

Trial Examiner Bellman. The document is admitted in evidence as Respondent's Exhibit 1.

(The document heretofore marked as "Respondent's Exhibit No. 1" for identification was received in evidence.)

Is this the first document in point of chronology which you received pertaining to Jennie Kane [referring to Respondent's Exhibit 1]?

106 The Witness. Yes, sir.

By Mr. Moch:

Q. When does this document purport to have been mailed, Mr. Elbery?—A. It looks like May 1. It is rather faint.

(The original of which Respondent's Exhibit 1 is a photostat is shown to the witness.)

A. (Continuing.) May 1, 1944.

Trial Examiner Bellman. The witness was looking at a photostat and you showed him the original document. If there is any question as to the clarity of the date on the photostat let us have the original compared by counsel and have it stipulated in the record what the original document shows. That is the way to handle that.

Mr. ROEWER. My understanding is that they are mailed out the same day.

Trial Examiner BELLMAN. The fact of the matter is that the photostat is blurred while the original shows the date clearly. What does the original show as to the date of mailing?

Mr. HALLORAN. It appears to me to be May 1, 1944.

Mr. ROEWER. And to me.

Trial Examiner BELLMAN. That is the respondent's understanding, too?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. All right.

107 Q. On this copy what is given as the date of Mrs. Kane's separation from the company?

Trial Examiner BELLMAN. Is that clear on the face of the document?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. It does not have to be testified.

Mr. MOCH. No.

A. March, 1944.

Mr. MOCH. The date of separation of Mrs. Kane from the employ of the Tower Company is set forth as March of 1944; reason for separation, left, could not continue to do heavy work of carrying bundles which was part of her job.

Q. The first you knew of that notice was the Monday following the election?—A. When I found it in the file on that day.

Q. It had not come to your attention before?—A. No.

Trial Examiner BELLMAN. Was that also the first you knew of any such matter as her having left in March and having left because she could not continue to do heavy work?

The WITNESS. That was the first notice I had had.

Q. After discovering that did you pursue your investigation further?—A. Yes.

108 Q. What did you do?—A. Called at Mrs. Kane's home.

Q. With anybody or alone?—A. With an attorney.

Trial Examiner BELLMAN. May we have the name of the attorney?

The WITNESS. Mr. Hession. Mr. Hession and I visited Mrs. Kane at her home.

Q. The same day?—A. I believe it was the same day, and I asked her——

Mr. HALLORAN. I object, may it please the Trial Examiner, to any conversation between this witness and Mrs. Kane, who has not been produced here as a witness by the respondent. This is absolutely hearsay. It is presented here as hearsay evidence, and the Board is in the position of having no means whatsoever at the moment to combat such testimony.

If we are going through this hearing with the respondent presenting his evidence in the way of hearsay statements, first in the case of somebody whose name the factory superintendent does not remember, and secondly in the case of a woman that he visited in company with an attorney, I submit if we are going to go through the respondent's case in that way it certainly does not help the Board one iota in arriving at a correct solution of the prob-
109 lem presented. I am strenuously objecting to any conversation had with Mrs. Kane, who is not a party to this proceeding.

Mr. Moch. I will withdraw the question at this time.

Q. While you were visiting Mrs. Kane did she sign a statement?—A. She did.

Q. Was that statement in writing?—A. It was.

Q. Is that the statement [handing paper]?—A. That is the statement.

(Thereupon the document above referred to was marked as "Respondent's Exhibit No. 2" for identification.)

Q. Did Mrs. Kane sign it?—A. She signed it.

Q. In your presence?—A. Yes.

Q. And Mr Hession signed it in your presence as a witness?—A. That is right.

Q. Did Mrs. Kane read that statement before she signed it?—A. She did.

Q. Was it also read to her before she signed it?—A. It was.

Mr. Moch. I offer the statement.

Mr. Halloran. I object.

Mr. Roewer. I object.

110 Mr. Moch. I offer Respondent's Exhibit No. 2 for identification.

Trial Examiner Bellman. This appears to be the statement quoted in part by the Regional Director. I overrule the objection and will admit the document as Respondent's Exhibit No. 2.

(The document heretofore marked as "Respondent's Exhibit No. 2" for identification was received in evidence.)

Mr. Moch. The statement is dated May 8, 1944——

Trial Examiner Bellman. Do not attempt to read into the record everything that you introduce as a document.

Mr. Moch. I want to read certain portions of it.

Trial Examiner Bellman. It is in evidence. If there is any part of it that you want to cite in your brief you may do so; and in oral argument, if you want to read part of it you may do so. You do not put documents in and proceed to stand here and read them. This is in evidence.

Mr. Halloran. The Trial Examiner understands, I assume, the

ground of the objection made by the Board, that here is a statement presumably signed by a person not a party to these proceedings. The Board has no opportunity to cross-examine her with respect to the subject matter of the statement, how it was prepared, whether the statement contains all that she told those persons, whether she did in fact say the things contained
111 in the statement, whether it was actually read to her, or whether she read it. In other words, the Board is put in the position of having evidence offered at this hearing which, so far as the Board is concerned, it is not able to contradict through the person herself.

They could produce 50 or 60 statements of that nature, and if they were all in evidence they would be proving the whole thing by hearsay evidence.

As far as I know, the person who purported to give the statement is available and could be produced here today and the statement could be put in properly through that witness.

Mr. ROEWER. There is another basis of objection. I question the right under the Act of the employer in this case to inquire from anyone that he said was eligible to vote, as to how that person voted.

Trial Examiner BELLMAN. It is clear that this matter has been considered in part at least by the Regional Director. I will let the ruling stand.

Mr. ROEWER. May I see the statement?

Trial Examiner BELLMAN. Surely. It is in evidence. Here it is [handing paper].

I will vacate my ruling admitting it, if you want to make an objection based on the fact that you have not seen it. It was here and I thought everybody had ample opportunity to examine the statement. When anything is offered everybody has a right to look at it.

112 Mr. ROEWER. Documents of this sort are usually offered by counsel who first offer them to counsel on the other side. It was given to the Trial Examiner and then offered by counsel for the respondent.

Trial Examiner BELLMAN. What do you mean?

Mr. ROEWER. Ordinarily when counsel introduces a document it is submitted to counsel on the other side before it is admitted.

Trial Examiner BELLMAN. You think that respondent's counsel was in error in not handing it to you before he had it identified?

Mr. ROEWER. That is right.

Trial Examiner BELLMAN. You have it before you now.

After this, documents will be identified first and marked for identification, and all parties will have due opportunity to ex-

amine them carefully. Then I will ask you if you have had ample opportunity to examine the document.

Has counsel for the union had ample opportunity to examine the document which has been marked as Respondent's Exhibit 2 for identification?

Mr. ROEWER. Yes, sir.

Trial Examiner BELLMAN. Has counsel for the Board had ample opportunity to examine Respondent's Exhibit 2 for identification?

Mr. HALLORAN. Yes, sir.

113 Trial Examiner BELLMAN. Any objection?

Mr. ROEWER. I do object.

Trial Examiner BELLMAN. Is there anything further?

Mr. HALLORAN. Just the original objection.

Trial Examiner BELLMAN. The objection is overruled and the document is admitted as Respondent's Exhibit 2.

(The document heretofore marked as "Respondent's Exhibit 2" and received in evidence was readmitted.)

By Mr. MOCH:

Q. Will you explain to the Trial Examiner, Mr. Elbery, the type of work which Mrs. Kane did prior to March, 1944?

Mr. ROEWER. I object.

Mr. HALLORAN. I object on the ground that it is immaterial to the issues involved in this case.

Trial Examiner BELLMAN. In what way might it have a bearing?

Mr. MOCH. On the basis of the evidence which is already in it shows that Mrs. Kane was not capable of being employed at the respondent's plant, that she was not capable of working. I will endeavor to show the type of work she was doing and I will ask Mr. Elbery whether she could do any easier work.

Trial Examiner BELLMAN. What has that to do with whether or not she actually quit?

Mr. MOCH. In the notice from the Division of Unemploy-
114 ment Security the reason given was that she left, could not continue to do heavy work of carrying bundles, which was part of her job. We want to show if she could not do that she could not do anything.

Mr. HALLORAN. That does not follow.

Trial Examiner BELLMAN. It may or may not. I will let the evidence in.

A. Mrs. Kane was a stitcher.

Q. Give us a brief idea of what a stitcher does.—A. Well, she gets bundles in amounts of twenty garments at a time, does her portion or her part of the making of the garments and returns them to the table, which may be some little distance from her particular machine.

Q. Was there any lighter work in the plant which Mrs. Kane could do?

Mr. HALLORAN. I pray your Honor's judgment. Is this man competent to give an opinion as to whether this woman can or cannot perform certain types of work? I object.

Trial Examiner BELLMAN. Did she ever ask you for lighter work?

The WITNESS. No, sir.

Trial Examiner BELLMAN. How does it become in issue?

Mr. MOCH. There wasn't any to be had, anyway.

By Trial Examiner BELLMAN:

Q. She never indicated to you at any time before you
115 found this slip (Respondent's Exhibit 1) in your file, that she found the work she was doing to be too hard or asked for lighter work?—A. That is correct.

Q. The first you learned of her feeling that the work was too heavy was when you found this document on May 8?—A. That is correct.

By Mr. MOCH:

Q. State whether or not, to the best of your knowledge, Mrs. Kane appeared at the plant from March 24 to May 5?—A. Not to my knowledge.

Q. State whether or not, to the best of your knowledge, she has appeared since?—A. Yes.

Q. When?—A. Approximately three or four weeks ago.

Q. For what purpose?—A. She came in and asked for a release.

Q. What reply did she receive?—A. I told her I did not think she required a release.

Mr. MOCH. You may inquire.

Cross-examination by Mr. HALLORAN:

Q. You prepared the list that was furnished to the Board and which was subsequently used as the check list at the voting?—A. I helped to do that.

116 Q. Who else helped you?—A. A clerk in my office.

Q. He was operating under your supervision?—A. A young lady.

Q. She was operating under your supervision?—A. Yes.

Q. Where did you get the information that caused you or caused that clerk to write the words "Out sick" after the name of Mrs. Kane on the eligibility list?—A. I don't believe I could answer that question myself.

Q. But you did get the information?—A. Yes.

Q. That she was out sick?—A. Yes.

Q. Have you a Miss Stone in your office?—A. We have a Miss

Stone. She is not in the office. She is in the plant. She is a forelady.

Q. At some time did Miss Stone, the forelady, communicate with you or communicate with the office relative to Mrs. Kane's absence from work?—A. May I get that question again?

Mr. HALLORAN. Read the question.

(The question is read as above recorded.)

Mr. MOCH. You mean while she was out of the plant?

Q. (Continuing.) After March, when she ceased working.

117 Mr. MOCH. Up to the time of the election?

Mr. HALLORAN. Yes.

A. Mrs. Kane sent a note addressed to Miss Stone, asking that her pay be given to another operator, and that was the pay of that last week that she was there. That is a rule of our company, that the only time we will give anybody any pay for another employee is when a written note is sent by the employee whose money it is.

Q. Miss Stone, I assume, turned that note over to you?—A. Not to me, sir.

Q. To whom did she turn it over?—A. That went to the cashier.

Q. Did you receive the note yourself?—A. I didn't see the note myself.

Q. Is that note available?—A. I don't know.

Mr. MOCH. Here it is [handing paper].

Mr. HALLORAN. Can it be agreed that this is a note that was given to Miss Stone and subsequently turned into the office?

Mr. MOCH. Ask the witness.

The WITNESS. I will agree to it.

Mr. HALLORAN. The witness said he had not seen it.

Mr. MOCH. I do not believe he said he had not seen it.

Trial Examiner BELLMAN. Just give it to the witness and

118 ask him whether he can identify that note.

(Thereupon the document above referred to was marked as "Board's Exhibit No. 5" for identification.)

The WITNESS. I can; yes.

Trial Examiner BELLMAN. What is it?

The WITNESS. It is the note that Mrs. Kane wrote to our Miss Stone.

Trial Examiner BELLMAN. The note that you just testified about?

The WITNESS. Yes.

Trial Examiner BELLMAN. Off the record.

(Discussion off the record.)

On the record.

By Mr. HALLORAN:

Q. Can you give us the date, if you know, when this note came from Mrs. Kane?—A. I can't give you the date. I can simply

say that it had to do with the money on the pay day about the last of March.

Mr. HALLORAN. I offer in evidence the document previously marked as "Board's Exhibit No. 5" for identification, being the note testified to by the witness from Mrs. Jennie Kane to Miss Stone.

Trial Examiner BELLMAN. Any objection? (No. objection.) There being no objection the document is admitted in evidence as Board's Exhibit 5.

119 (The document heretofore marked as "Board's Exhibit No. 5" for identification was received in evidence.)

By Trial Examiner BELLMAN:

Q. Is this the last communication of this type that you received from Mrs. Kane, concerning pay [referring to Board's Exhibit 5]?—A. That is right.

Q. Your pay practice is to hold back a week?—A. Yes.

Q. What day was Mrs. Kane last paid for?—A. March 24, the last day she worked.

Q. And she was paid a week or so after that?—A. It was the Friday of the next week. Friday is pay day.

Q. It would be Friday?—A. Friday of the week after March 24.

Q. It would be the Friday after the Friday of the week in which March 24 fell, wouldn't it?—A. I don't know just what day of the week March 24 fell on.

Q. We have a calendar, and perhaps we can get that cleared up [consulting calendar]. March 24 was on Friday.

A. It was the following Friday.

Q. It would be the 31st of March?—A. That is right.

Q. Did you receive any other communication of any kind, in writing or orally, from Mrs. Kane between the time this
120 letter was received and the day of the election?—A. No; not at all.

Mr. HALLORAN. Respondent's Exhibit 1 indicates that notice of the filing of the claim by Mrs. Kane was mailed to the company on May 1, 1944. Will you agree that the company received the notice on May 2, 1944?

The WITNESS. I cannot agree to that, sir. I did not see it.

Trial Examiner BELLMAN. How far is the company's plant from Boston?

The WITNESS. A very short distance. It should be overnight, as a matter of fact.

Mr. HALLORAN. It is part of Boston itself.

Trial Examiner BELLMAN. It is located where?

The WITNESS. Roxbury, a suburb of Boston, probably not more than three or four miles from downtown Boston.

Trial Examiner BELLMAN. In the normal course of your busi-

ness, if you were counting on receiving or sending communications through the United States mail, would you consider 24 hours a reasonable period of time in which to get delivery?

The WITNESS. Yes; I would.

By Mr. HALLORAN:

Q. So that, assuming that the mails functioned in the usual manner, your company would have received this notice of
121 claim filed by Jennie Kane on May 2, 1944?

Mr. MOCH. Objection.

Trial Examiner BELLMAN. Overruled.

Mr. MOCH. Can't we have another assumption?

Trial Examiner BELLMAN. Read the question.

(The question is read as above recorded.)

Mr. MOCH. Could we add the assumption that it was mailed on May 1?

Trial Examiner BELLMAN. The original official document is stamped "Notice mailed May 1, 1944." You have the assumption that the document was mailed on the day that it was stamped as mailed.

(To witness.) Assuming the document was mailed on May 1, as it is stamped as having been mailed, in the normal course of the delivery of mails in and about this vicinity, would this normally be received by you on the second?

The WITNESS. Providing the second was not on Saturday.

Mr. MOCH. It was not. It was on Tuesday.

The WITNESS. It should be the next day otherwise.

Trial Examiner BELLMAN. Here is a calendar (handing calendar). May 2 appears to be Tuesday.

The WITNESS. That is right.

By Mr. HALLORAN:

Q. I think you testified that your company frequently
122 receives notices of claims filed?—A. Occasionally, yes.

Q. What is the usual procedure when the company receives one of those notices?—A. We file them, if we have no objection.

Q. Who sees the notice first?—A. Well, they are opened by a mail clerk and they are then left on my desk for perusual. From there they are filed.

Q. So that when they are received and the mail clerk has sorted them out along with the other mail that he receives, they are placed on your desk?—A. Yes.

Q. On the desk of the factory superintendent?—A. Yes.

Q. So that assuming that this notice was received on Tuesday, May 2, it was placed on your desk on Tuesday, May 2?—A. I can't answer, because I never saw it until I looked for it.

Q. Have you ever known of any instance before when a letter or report which was to go to you and was received at your plant on a certain day, was not placed on your desk on that day?—A. I cannot answer that.

123 Q. Have you ever known of any situation before in which one of these notices of claim was not placed on your desk the day that it was received?—A. I am not at all sure that I have not missed others.

Q. It is a fact, Mr. Elbery, that in the ordinary course of events this notice of claim would be on your desk the day it was received?—A. Yes.

Q. Are you on the job there every day?—A. Yes.

Q. You were on the job every day during this period?—A. Yes.

Q. There wasn't anybody filling in for a day or two or anything?—A. No.

Q. You will notice it says in this notice of claim, "If you know of any misrepresentation or other reason why payment of benefits should not be made to this claimant, you must, under the law, complete this form and return it to the office location shown above within seven days from the date appearing in the notice of mailing." Did you send any communication to the Federal Security Agency that sent out this notice, relative to this woman?—A. No.

Q. Is it not a fact that if conditions warrant, you immediately notify Federal Security as to the reasons why compensation
124 should not be paid to the claimant?—A. We do.

Q. Didn't you have within your knowledge at that time certain information relative to Mrs. Kane?—A. I didn't see the form. I had no occasion to do anything about it.

Q. Will you agree with me that the form was received?—A. It was in the file when I looked for it that Monday. It must have been received.

Trial Examiner BELLMAN. Did you send out any objection on Monday, May 8?

The WITNESS. No, sir.

Trial Examier BELLMAN. That would be within the seven days, wouldn't it?

The WITNESS. Yes.

By Mr. HALLORAN:

Q. Have you sent out any objection up to the present day?—A. No, sir.

Q. Is Mrs. Kane working for the company now?—A. No, sir.

Q. Are you sure of that?—A. The last day she worked for the company was March 24.

Q. Would you know whether or not she had returned to work for the company?—A. Yes.

Q. Has Mrs. Kane been terminated on the rolls of the com-

125 pany up to the present day, Mrs. Elbery?—A. Her name is off our list.

Q. When was it taken off?—A. I have no definite date of that. I can check it.

Q. Within the past week?—A. No; before that. Several weeks ago.

Q. Was it taken off before May 8 or after May 8?—A. It was after May 8. That is the first we knew she got through.

Q. How long after May 8?—A. I wouldn't know the exact date.

Q. Was it a matter of days or weeks?—A. I would want to check before I could make an honest answer to that question.

Q. Why did you tell Mrs. Kane that she did not need any release from your company?—A. Because she told me she had gone down and applied for unemployment compensation, it is my opinion she did not need a release.

Q. When did she tell you?—A. On a Tuesday, about three or four weeks ago when she came to the plant.

Q. You mean that she has visited the plant since the election?—A. Oh, yes; about a month, or three or four weeks ago, as
126 near as I can judge.

Q. It was not during your conversation with her at her home on May 8, that she asked you about the release, was it?—A. No. This was just within a month.

Q. In that conversation of some weeks ago, at the plant, did she indicate to you that she planned to return to work when she was able?—A. No.

Q. Did you ask her when she was going to return to work?—A. No.

Q. What else did you talk about at the conference with Mrs. Kane, at which was present Attorney Hession and at which a signed statement by Mrs. Kane was procured? Besides what is in that statement, what else was talked about?

Mr. Moch. Objected to for the same reason that the attorney for the Board objected when I attempted to ask a similar question.

Trial Examiner Bellman. I will overrule the objection.

A. What else did we talk about?

Q. Yes.—A. It was mostly a matter of questioning Mrs. Kane as to her status with the company. Attorney Hession asked her several questions which are embodied in the statement. He got her answers orally and then wrote them down.

Q. Do you mean that everything she said in answer to
127 questions by Attorney Hession is included in this statement that was signed?—A. I wouldn't say everything was; no, sir.

Q. I want you to look at that statement and tell the Trial Examiner anything that was talked about there that is not in the statement.—A. I can't think of anything other than what is covered.

Q. How long were you talking to Mrs. Kane?—A. Why, we might have been there 20 minutes or 25 minutes.

Q. During that period I assume Mr. Hession was asking her numerous questions?—A. Yes. As a matter of fact, we carried on a little conversation about her family—I did, with her.

Q. Did she tell you or Mr. Hession at that time that she had been told by some of her fellow workers that the only way she could get compensation was to say that she had left the employ of the company?—A. I do not recall that.

Q. You do not recall that?—A. No.

Q. You think it may have been said by her?—A. Possibly.

Q. I notice in the statement appears this language: "I voted for the union at the election on last Friday." Who asked
128 her that question?—A. Mr. Hession.

Q. He asked her for whom she voted?—A. That is right.

Q. And she answered that she voted for the union?—A. That is right.

Q. Did Mr. Hession also ask her if she had been driven to the polling place in a union automobile?—A. I don't recall that.

Q. Did she admit at any time that she did not intend to return to the employ of the Tower Company?—A. No; she didn't definitely say that she was not going to return.

Q. As a matter of fact, she said she was going to return to the company?—A. No, sir.

Q. When she felt better?—A. No, sir.

Q. Didn't she say in her statement, "I haven't worked since leaving the Tower Company, because of my physical condition"?—A. Yes.

Q. You mean to say she didn't go further and say that when she was able to return she was going to return?—A. In the talk I had with Mrs. Kane that day she gave me the impression that she never expected to return to work again because of her physical condition.

129 Mr. Roewer. I ask that the answer be stricken as not responsive.

Trial Examiner Bellman. Read the question, and the answer.

(The question and answer are read as above recorded.)

I will overrule the objection and will let the answer stand.

Do you mean by that that she gave you the impression that her physical condition was so bad that she did not know whether she would ever be able to come back to work?

The Witness. Yes, sir.

Trial Examiner BELLMAN. Did you make the remark that "You are off our pay roll" or "We hope you will come back when you are able"?

The WITNESS. I didn't make any comment.

Trial Examiner BELLMAN. You did not tell her that because of her physical condition she was through?

The WITNESS. No.

By Mr. HALLORAN:

Q. You did not tell her on that day, as I understand, that she was through as an employee of the Tower Company?—A. Not at that visit; no.

Q. At any time did you tell her that she was through?—A. I told her three or four weeks ago, when she came in, that she was no longer on our rolls as an employee, that we considered her as off our pay roll.

130 Q. Were you present at the scene of the balloting on election day before the polls opened?—A. Not in the room where the balloting was; no, sir.

Q. You did furnish two company observers for the company balloting?—A. Yes.

Q. And an attorney was there?—A. Yes.

Q. Which attorney was that?—A. Mr. Noonan.

Q. He was present up to the time that the balloting started?—A. I believe he was.

Q. Were you there after the polls closed?—A. I was through the plant all day.

Q. Were you there when the ballots were counted?—A. No; I wasn't in the room at any time that day.

Q. Was the attorney present?—A. Yes.

Q. Do you know whether or not it was a fact that before the observers signed any papers relative to the election they got permission from Mr. Noonan to do so?—A. No; I do not know that.

Trial Examiner BELLMAN. The respondent is not in any way challenging the regularity of the election or the way it

131 was conducted?

Mr. MOCH. No.

Trial Examiner BELLMAN. You were given full opportunity to challenge the voters, as I understand your position, but you did not challenge this one on that day for the reasons that you stated?

Mr. MOCH. That is right; yes, sir.

Q. Were the two persons whom you designated as observers for the company pay-roll clerks?—A. One was a factory office clerk, a young lady; and another, a gentleman, was a clerk in the main office.

Q. What was the name of the factory office clerk?—A. Miss Helen Considine.

Q. Does she handle the time cards or the time records of the employees of the factory?—A. No. That is, she handles them in part. Do you mean, does she make up the pay roll?

Q. Yes.—A. No.

Q. Does she keep a record of those who are not working on certain days?—A. She only gets those records—may I explain this a little bit?

Q. Yes.—A. She gets the pay-roll slips after they are
132 made out and notes the number of hours that each employee works for that pay roll period, on individual cards. Each operator has an individual card about this size [indicating], on which we put down all the pertinent information about their earnings, hours worked, average hourly rates, and so forth. The only reason Miss Considine gets that is so that she can fill in that information from week to week on these cards.

Q. Does she have available a list of all employees in the factory?—A. Her only list would be through the cards that she has.

Q. So that she would know, in the ordinary course of events, if an employee, such as a stitcher, was out of work an unreasonable length of time?—A. That is correct.

Q. And as of May 4 or May 5, the day of the election, Mrs. Kane had been out of work about six weeks, hadn't she?—A. Yes.

Q. I assume it is part of the duties of the factory office clerk to call to the attention of the office any unreasonable or unusual absences of employees from work?—A. Not particularly. We have had employees out for months that we knew were definitely ill.

Q. It was within this clerk's knowledge that that employee was out for a very long period of time?—A. Yes.

133 Q. As far as you know, neither the office nor you were notified of this lengthy absence of Mrs. Kane?—A. It was not pointed out in more than probably half a dozen other cases at the same time.

Q. Mr. Kissick was also an observer for the company?—A. Yes, sir.

Q. What does he do?—A. He is an office clerk. He has nothing to do with pay rolls.

Q. Or with any of the factory employees?—A. No.

Q. I want you to think hard and see if you cannot recollect the name of that employee who told you on Monday, May 8, that she objected to the fact that Mrs. Kane had voted.—A. I can't think of her name.

Q. Do you know in what department she worked?—A. She was a stitcher.

Q. Did she come to you in the morning or in the afternoon?—A. I believe it was early Monday morning.

Q. And the election had been held when?—A. Friday.

Q. The previous Friday?—A. That is right.

134 Q. Were the stitchers working on Saturday?—A. No.

Q. Do you recall when the polls closed on Friday?—A. I am not certain. I believe it was either 2:30 or 3:30.

Q. Was this girl, who you say gave you this information, working on Friday afternoon?—A. I am not sure. I don't know.

Q. Didn't you think it was important to make some notation of the name of the person who sent you on your elusive investigation?—A. No; at the time I didn't.

Q. How did it happen that you headed for the United States Employment Service as your first step?—A. It just occurred to me that if it was so, as this person supposed, that this woman had probably gotten another job and was working some place else, I felt that there would be some record down there because, after all, she would have to get a certificate of availability either from us or from the United States Employment Service. If she was found to be working in another job, that is what I was thinking about, how could she get another job without a certificate of availability.

By Trial Examiner BELLMAN:

Q. Did you come into Boston immediately?—A. I did, sir, and went in to the United States Employment Service, on

135 Monday, to ascertain if she had got a certificate of availability.

Q. This woman whom you cannot identify said she thought Mrs. Kane was working somewhere else?—A. That is the story.

By Mr. HALLORAN:

Q. As the result of your investigation did you find that Mrs. Kane was working anywhere else?—A. No; she was not.

Q. Isn't it a fact that up to the present day Mrs. Kane has not worked anywhere else?—A. I couldn't say that.

Q. So far as you know, she has not worked for anybody else?—A. So far as I know, she has not.

Q. Just to get a point clear in my mind, you say about three or four weeks ago Mrs. Kane went to the plant and talked with you?—A. That is right.

Q. And she said something about a release?—A. She asked for a release.

Q. And you said, "You don't need any because you are not on our pay roll"?

A. I told her I didn't think she required a release, not because she was not on our pay roll but because she mentioned that she had gone down to get some unemployment compensation.

Trial Examiner BELLMAN. Does one have to have a
136 release in order to get unemployment compensation?

The WITNESS. Not according to my understanding of it.

Trial Examiner BELLMAN. When and why does one get this release?

The WITNESS. That is the certificate of availability that one must get from a plant doing important work, to get a job any other place.

By Mr. HALLORAN:

Q. At that time was anything said by her as to why she had filed for compensation?—A. She told me she was still feeling ill.

Q. She didn't feel able to work?—A. She didn't say that. She said she was still feeling kind of mean.

By Trial Examiner BELLMAN:

Q. If she was trying to get another job she would have to get a certificate of availability?—A. Either from us or the United States Employment Service.

Q. If she was just trying to get compensation she wouldn't need a certificate of availability?—A. She wouldn't require availability.

Q. Can she get unemployment compensation if she is just sick?—A. I wouldn't want to be sure in answering that.

Q. Under your set-up do your employees get sick benefits from the same agency which sends this notice which is marked
137 as "Respondent's Exhibit 1"?—A. I wouldn't want to answer that, sir, whether it is through the Unemployment Compensation or the Social Security that a sick person would be aided. I think Unemployment Compensation has to do only with helping people to get them another job.

Q. What sick benefits are employees in your plant able to get?—A. You mean through the State or the Government?

Q. From any source?—A. I am not very well versed on that. I wouldn't want to answer.

Q. Does an employee in your plant have any protection whatsoever against an illness which would keep him out of work for a while, other than he might be supplying himself with a form of private insurance?—A. I would like to be able to give you a definite answer on that. I could only guess.

Q. Does the company contribute to any kind of a fund?—A. No.

Q. Does it have any kind of group insurance?—A. No.

Q. There was nothing that the company was contributing to in any way which Mrs. Kane had been or would have been
138 receiving in the form of sickness compensation?—A. No.

Q. Or disability compensation?—A. No.

Q. When you referred to your having to fill out certain parts

of Respondent's Exhibit 1, if you had objection, what did you mean by using the word "objection" there?—A. What is that question in connection with?

Q. In connection with Respondent's Exhibit No. 1, you said, I think, that you put this kind of a document in the file if you did not have any objection.—A. There are certain stipulations here that are in small type [indicating].

Q. Will you indicate what you mean by the matters in small type?—A. About half way down you will read "Payment of benefits to the individual named above may be affected by any one of the following reasons."

Q. If any of those reasons are controlling you are supposed to indicate that and send the form back to the Commission?—A. That is correct. For instance, there is one here that says "suitable work now available." If a party had gone in and said they were laid off because of no work, obviously we would object to it on the ground that there was work for them.

139 Q. What does the process consist of, of taking anyone's name off your list?—A. It is simply a matter of taking their card and placing it in another box among the cards of those who have left our employ.

Q. Do you notify any agencies at all that you are no longer paying contributions or taxes on such employees?—A. No, sir.

Q. Do you fill in any regular forms to send to any agencies, indicating that persons have been so separated?—A. Yes.

Q. To whom do you send such forms?—A. I send one each month to the United States Employment here in Boston, and I believe our cashier in the main office sends one to the Department of Labor.

Q. Can you give me the date or dates upon which those forms were sent?—A. I can't, sir.

Q. Can you give me the approximate date?—A. Well, about two weeks ago would bring it to, say, the middle of the month. That was the last of the local or the United States Employment records that were sent out.

On what date our cashier sends one to the Department of Labor, I have no means of knowing.

Those forms—if I may add a little to that—ask the num-

140 ber of "hires," "fires," "quits," and so forth, for the month.

Q. Do you know approximately what date was given as the date of the separation of this employee, Mrs. Kane, in making those reports?—A. No.

Trial Examiner BELLMAN. Are there any further questions of this witness?

Mr. ROEWER. I have one or two questions.

Cross-examination by Mr. ROEWER:

Q. How long had Mrs. Kane been in the employ of the company?—A. The nearest I would want to come to that is to say that she was there probably something over a year.

Q. Something over a year?—A. Something over a year.

Q. As a stitcher she sits at a power-driven machine, does she not?—A. Yes, sir.

Q. Her principal function as a stitcher is the feeding of the garment into the sewing machine, which is power driven?—A. That is right.

Q. You said she had to carry a package or load of 20 coats?—A. Twenty garments. She was working on aprons most of the time.

141 Q. She was most of the time on aprons?—A. Yes.

Q. What would be the weight of this bundle of 20 aprons or 20 coats?—A. Not much.

Trial Examiner BELLMAN. Give us the approximate weight.

The WITNESS. Why, I would say if they weighed five pounds they would weigh a lot.

Q. As a matter of fact, her job had very little lifting in it, as far as weight is concerned?—A. Not too much.

Q. Is that right?—A. That is right.

Q. During the year that she worked there you had no complaint from her about the lifting part of it?—A. Not that ever came to my attention.

Q. Doesn't the A. J. Tower Company provide floor boys or girls to take the work away when the stitcher has finished the work?—A. Yes.

Q. Didn't you have such employees, as a matter of fact, in the plant when Mrs. Kane worked there?—A. Not the last few months that she was there. She worked in a small unit on the third floor. Our large main unit is on the fourth floor. We found it practically impossible to get help to take over the

142 carrying duties. The result is what carriers we had were kept where the main group or large group of stitchers were.

Q. You say that this group of coats or aprons would not exceed five pounds in weight?—A. I would say so.

Q. How far would this bundle have to be carried by Mrs. Kane, wherever she had to take it?—A. Probably as far as from here to that wall there [indicating 12 to 15 feet].

Q. Less than 12 to 15 feet?—A. Yes.

Q. Do you recall being present at the hearing on the objections to the certification, before Dr. Myers, when Mr. Noonan was present?—A. Yes.

Q. It was something more than just a conference, wasn't it?—[No response.]

Q. You testified, didn't you?—A. I did.

Q. In other words, when Mr. Noonan was handling his case, he put you on the stand as a witness; isn't that right?

Mr. Moch. Just a moment. I object to this line of questioning. The record speaks for itself. The report is in there. If counsel wants to ask Mr. Elbery any questions of fact he is entitled to do so.

143 What is the purpose of this?

Mr. Roewer. Up to this point the conferences or hearings before Dr. Myers have been referred to as conferences. I want to bring out that this was not a conference exclusively, but a hearing.

Trial Examiner Bellman. I don't care what they were called or how they were called. They could not have been formal hearings in the sense that this is a formal hearing. I do not think anyone contends that.

Mr. Roewer. I do not contend that they were formal hearings. I want to contend that the respondent in this case was heard at length, with witnesses.

Trial Examiner Bellman. Nobody questions that. I think the respondent has conceded that it is making no contention that it was not fully heard.

Mr. Moch. That is right.

Trial Examiner Bellman. Everything that you wanted to put on you were given an opportunity to put on? Is that correct?

Mr. Moch. Absolutely.

Trial Examiner Bellman. I thought it was conceded. There is no need of covering material that is conceded.

Mr. Roewer. I had in mind the language of the courts in other cases. I have no further questions.

144 Mr. Halloran. I have no further questions.

Trial Examiner Bellman. Do you have anything further, Mr. Moch?

Mr. Moch. No.

By Trial Examiner Bellman:

Q. What is the usual policy of your company with reference to employees who are sick?—A. If we have an old and loyal employee we will aid them, one who has been with us for some time. We have no general policy of aid.

Q. I do not mean in terms of giving them assistance. I mean in terms of severing them from the pay roll.—A. We have no time limit. We have never set a time limit as to how long an employee might be out ill before we would separate him from our pay roll.

Q. Employees have been ill for periods of months and have re-

mained on the pay roll?—A. Months. In some cases a good many months.

Q. When was the first time you informed Mrs. Kane that she was not on your pay roll?—A. The first time I informed her of that was about a month ago. That was the first occasion I had to see her since back in May.

Cross-examination by Mr. HALLORAN:

Q. That would be about July 3?—A. You mean the last time she was in the office?

145 Q. When you informed her she was no longer on the pay roll?—A. I would say three or four weeks, as a guess.

Q. It might have been three weeks?—A. It may have been three.

By Trial Examiner BELLMAN:

Q. Have you ever mailed her anything in writing indicating that?—A. No, sir.

Q. How did the matter come up when you informed her that she was off the pay roll? Just what did you say?—A. As I say, she came in and wanted to know if she could get a release, and she further stated that she was trying to get unemployment compensation. I told her that I did not believe that she needed a release for that purpose. She then said, "Well, possibly I have applied for the wrong thing." She said, "I think I will go down and see about getting Social Security benefits." It was at that point that I told her that as far as our records showed, she was not on our list as an employee.

Q. Did she say anything at all in that interview about wanting to get a job at another plant?—A. No; she didn't mention it.

Q. Did she say anything at all about wanting to work at your plant?—A. She asked me if we had some light work and I said "No; we have no light work, nothing lighter than what you have done."

146 Trial Examiner BELLMAN. Are there any other questions?

Mr. MOCH. I have two.

Redirect examination by Mr. MOCH:

Q. Do you ever indicate severance of employment by a written notice to employees?—A. No; we make no practice of that.

Q. Did this notice from the Division of Employment Security ever come to your attention prior to Monday, May 8, 1944?—A. No.

Q. It was simply filed without your ever having seen it?

Mr. ROEWER. I object to that. It is immaterial.

Trial Examiner BELLMAN. Overruled.

A. Yes.

Q. Did you ever make any objection in regard to this notice?—A. Of her work!

Q. Yes.—A. No.

Q. Do you think you should?

Mr. ROEWER. I object.

Trial Examiner BELLMAN. Does he think now that he should have made it?

Q. Do you think you should have made an objection as
147 soon as it did come to your attention?—A. No; because, after all, she said that she had left.

Mr. MOCH. No further questions.

Mr. HALLORAN. No further questions.

Mr. ROEWER. I have no questions.

Trial Examiner BELLMAN. The witness is excused.

(Witness excused.)

Mr. HALLORAN. I have copies of the letter of May 9, 1944, sent to the Board by the Company's attorney, setting forth the objection to the election. I understand that counsel for the company and counsel for the union have no objection to its being admitted in evidence.

Mr. MOCH. No objection.

Trial Examiner BELLMAN. Do you want it to be identified in the record as a Respondent's Exhibit or as a Board Exhibit?

Mr. MOCH. It is perfectly immaterial.

Mr. HALLORAN. I offer it as Board's Exhibit No. 6.

(Thereupon the document above referred to was marked as "Board's Exhibit No. 6" for identification.)

Trial Examiner BELLMAN. Is there any objection to its being received in evidence?

Mr. MOCH. No, sir.

Trial Examiner BELLMAN. Has everybody had every opportunity to examine it?

I will admit it in evidence as Board's Exhibit 6.

148 (The document heretofore marked as "Board's Exhibit No. 6" for identification was received in evidence.)

The hearing will be in recess for five minutes.

(Short recess, following which the hearing was resumed.)

The hearing will be in order.

FREDERICK A. NEWMAN, a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MOCH:

Q. Your name, please?—A. Frederick A. Newman.

Q. Your position with the company?—A. General manager.

Q. Were you present at the hearing in the office of the Regional Director, at which the consent agreement was arranged?—A. Yes.

Q. And a list of your employees in the unit was requested of you?—A. Yes.

Q. How much time did they give you to prepare that list?

Mr. HALLORAN. I suppose that is a matter that is set forth in the document before the Trial Examiner. The election date is set forth and the date of the agreement is set forth.

149 Mr. MOCH. The date of the hearing is not fixed.

Trial Examiner BELLMAN. Are you making any contention that if you had more time you would have found out, by some process or other, that Mrs. Kane was not an employee?

Mr. MOCH. I don't think we would have. The only contention we are going to make is that we did not have that opportunity, and we do not know what would have happened.

Mr. ROEWER. I object. I do not see that it is material at all.

Trial Examiner BELLMAN. How much time elapsed between the time you received the request and the time you actually furnished this pay roll?

The WITNESS. I wish I could tell you but I can't. I know I made the remark——

Trial Examiner BELLMAN. Why do you think this is material?

Mr. MOCH. I will withdraw the question.

Q. Can you tell us, of your own knowledge, approximately what time the polls closed?—A. My guess is 3:30.

Q. Can you tell us whether or not most of the employees returned to work or went home after voting?—A. Most of them left early that day.

Mr. MOCH. That is all.

Trial Examiner BELLMAN. Any question?

Mr. HALLORAN. No questions.

150 Mr. ROEWER. No questions.

Trial Examiner BELLMAN. The witness is excused.

(Witness excused.)

Mr. MOCH. I merely bring this up because I do not wish to get caught on it. I have gone into it before.

This is a proceeding for refusal to bargain. Before that can be ascertained this challenged ballot must be produced and what the vote is must be discovered.

Reserving all rights in connection with that, even if you toss out this vote, the vote is still going to be 115 to 114.

Trial Examiner BELLMAN. I understand what your contentions are.

Mr. MOCH. If we close this hearing without opening up that challenged ballot problem, I just want to be sure that we are not

going to end up with a vote of 115 to 114, even though you decide in our favor on the issue which we have been trying all day.

Trial Examiner BELLMAN. How would you propose to bring this challenged ballot before me? In other words, what is your proposition?

Mr. MOCH. I think the Regional Director should have decided the union's challenge and, if he overruled it, should have opened the ballot.

Trial Examiner BELLMAN. You think the Regional Director should have thrown out the vote of Mrs. Kane, and, by
151 having thrown out her vote, the challenged ballot would be material in determining the election?

Mr. MOCH. I do not know how you would suggest proceeding. I just want to be sure that you do not find that Mrs. Kane's vote should be tossed out and end up with 115 to 114, and have to come back and open up that challenged ballot.

Trial Examiner BELLMAN. I shall make an intermediate report to the board, a copy of which is served upon all the parties, and you will have your opportunity to take any exception to that. I suppose that would be the place at which you would take exception to any such action on my part as you now contemplate might be possible.

Mr. MOCH. If you decide that Mrs. Kane's vote should be tossed out, then what happens?

Trial Examiner BELLMAN. The intermediate report will be served on the parties and you will take an exception, I suppose.

Mr. MOCH. Even though you toss it out they will say, "We have a count of 115 to 114."

Trial Examiner BELLMAN. And one challenged ballot.

Mr. MOCH. Yes.

Trial Examiner BELLMAN. It seems to me you are resting your contention on the assumption that the challenged ballot would be material in determining the outcome and would have to be opened and counted.

152 Mr. MOCH. I will rest on that.

Trial Examiner BELLMAN. If you want to produce the challenged ballot I would have to subpoena it because it is not here.

According to your contention, if you are upheld there is a next step which would have to be taken before a majority could be decided?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. I do not know how you can take the next step after this step, before this step has been taken. You have further witnesses?

Mr. MOCH. No, sir; we rest.

Mr. HALLORAN. I have a witness in rebuttal.

Trial Examiner BELLMAN. Since all of the parties have rested, no one has called Mrs. Kane on your direct presentation at least. I do not want the record to be silent on whether or not the Trial Examiner would be willing to issue a subpoena for her. I will state now that if anyone wants to subpoena Mrs. Kane, I will be glad to hear him on the question of a subpoena. Do I hear any request for a subpoena, from any of the parties?

Mr. HALLORAN. The Board is not requesting a subpoena.

Mr. ROEWER. The union is not requesting a subpoena.

Mr. MOCH. Neither is the respondent.

Trial Examiner BELLMAN. Is there any rebuttal?

153 Mr. HALLORAN. I have a witness in rebuttal, sir.

Mr. ROEWER. May that name appear on the record as Mrs. Kane and not Miss Kane?

Trial Examiner BELLMAN. All right. It will be so corrected.

WILLIAM I. SHOOER, a witness called in rebuttal by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. HALLORAN:

Q. What is your name?—A. William I. Shooer.

Q. Where do you reside?—A. Cambridge, Massachusetts.

Q. You are an agent of the National Labor Relations Board attached to the First Region?—A. I am a field examiner attached to the First Region.

Q. At some time were you assigned to the representation case involving the A. J. Tower Company?—A. I was assigned so far as conducting the election was concerned; yes.

Q. I assume you were present when the election was held?—A. I was.

Q. At the close of the election, during the counting of the ballots, will you state whether or not Mr. Elbery was present?—

154 A. At the counting of the ballots, to the best of my knowledge and recollection, Mr. Elbery, Mr. Newman, Mr. Moch, and Mr. Noonan, and three union representatives, Mr. Barker.

Mr. MOCH. I object, if your Honor please.

Trial Examiner BELLMAN. Let me ask the materiality.

Mr. HALLORAN. I wanted to clear the road as I went along. Mr. Elbery's recollection was that this witness was not present at the time. I wanted to get out of the way that the witness was present, and then I will go on to the other matter.

A. (Cont.) Mr. Barker, a young union lady whose name I don't recall, another man, Miss Fountain, and myself representing the board, as well as the two observers for the company and the two observers for the union, were present at the count.

Q. At some time after the election do you know that objections to the election were filed?—A. Yes; I do.

Q. And there were two conferences held here in the office in connection with such objections?—A. Yes.

Q. In connection with that subject matter, Mr. Shooer, did you visit Mrs. Jennie A. Kane?—A. I did. I investigated the objections to the election.

155 Q. As a result of your investigation and immediately thereafter did you write a memorandum relative to the conversation that you had with Mrs. Kane?—A. I did.

Q. If necessary, Mr. Shooer, you may refresh your recollection from that memorandum?

Trial Examiner BELLMAN. Are you going to enter the memorandum or are you going to exhaust the witness' memory before refreshing his recollection? Are you going to ask him to use this document and testify from it or read it into the record?

Mr. HALLORAN. I see the Trial Examiner's point. I am willing to follow the regular procedure.

Q. Will you state to the Trial Examiner the date when you first talked with Mrs. Kane?—A. Immediately after receiving the objections to the election, in the form of a letter written by the attorney for the company, Mr. Noonan, I was assigned to investigate the case and was told to interview the witness, Mrs. Kane. This was about a day after we received that letter.

I attempted to reach her that night and was unsuccessful but succeeded in interviewing her, the next morning, which would make it May 10 or May 11.

Q. Assuming that the letter from Mr. Noonan was dated May 9 and received in this office on May 10, do you know

156 about when it was that you went to see Mrs. Kane?—A. I attempted to see her that very night but failed to do so and saw her on the 11th.

Q. Will you state to the Trial Examiner the conversation you had with Mrs. Kane?

Mr. MOCH. I make the same objection which my brother made when I attempted to do exactly the same thing with Mr. Elbery. It is exactly the same situation and exactly the same type of testimony. His objection was sustained and this is completely analogous.

Mr. HALLORAN. The objection was not sustained.

Trial Examiner BELLMAN. You withdrew the objection and proceeded by another route to place the affidavit in evidence.

Mr. MOCH. I think you ruled that the objection was sustained.

Trial Examiner BELLMAN. We will go off the record and have the stenographer read the record at that point.

(Discussion off the record.)

On the record.

The record has been read, and at the present time it does not appear that the Trial Examiner made a ruling. The completed record will show what actually transpired earlier in the hearing. Go ahead, Mr. Moch, and make your objection.

157 Mr. MOCH. I make my objection on the ground that evidently Mr. Shooer is going to be questioned about his conversation with Mrs. Kane and along the same lines as my brother so ably gave me, I object to this on the ground of hearsay. If he wants to produce Mrs. Kane as a witness he is at perfect liberty to do so.

Trial Examiner BELLMAN. It appears that this testimony is matter which came before the Regional Director in the course of his investigation, just as your affidavit which you have introduced came before him.

In any event, none of the parties seem to be anxious to subpoena Mrs. Kane, although I indicated that I would hear you on the issuance of a subpoena.

Mr. MOCH. This interview that is set forth in the Regional Director's report on objections was never presented at any hearing or conference at which the respondent was represented. This is the first time I ever saw it or heard about it or knew anything about it.

Trial Examiner BELLMAN. This will give you a full opportunity to cross-examine Mr. Shooer on whatever he says Mrs. Kane told him.

Mr. MOCH. Please note my objection.

Trial Examiner BELLMAN. Your objection is on the record. I will overrule it.

By Mr. HALLORAN:

158 Q. You say that on May 11 you went out and talked with Mrs. Kane?—A. Yes.

Q. Give us your best recollection as to what conversation took place between you and Mrs. Jeuuie A. Kane on that day. Was it in the morning, in the afternoon, or in the evening?—A. I visited Mrs. Kane about 9 in the morning.

Q. Was there anybody else present besides you and Mrs. Kane?—A. Mrs. Kane, at the first part of the interview, was alone. Later she was joined by her daughter.

Q. Will you state the conversation with her?—A. I explained to Mrs. Kane my connection, telling her I was an agent of the board and was assigned to investigate the case, that the company had objected to the election on the ground that she was not an eligible voter. I further went into detail and requested informa-

tion concerning her attempt to secure benefits from the Unemployment Compensation Bureau.

Mrs. Kane told me that she had been advised by friends of hers that the only way to get any money was to go to the Unemployment Compensation Bureau and apply for it, she thinking she was entitled to it as a matter of course because she was ill and not because she contemplated removing herself from the employ of the A. J. Tower Company.

I informed her that her step was incorrect so far as the law was concerned.

I then went into detail and asked her concerning a statement by the company's counsel to the effect that she had
159 voted for the union, and I said, "Did you say, 'I voted for the union?'" She said, "No. They asked me what my feelings were, and I told them that the union was a good thing. I don't recollect saying that I voted for the union. Of course they could tell—from the way I described it they might presume I did vote for the union." That was about the sum and substance of it.

I said, "Do you consider yourself an employee of the company?" She said, "I am sick." She gave me a doctor's certificate to show that she was out before and she was ill, and she said she hadn't worked elsewhere. She is an old woman and she thought when she felt better she would go back to the company and work there. I asked her how soon she would get back. She said, "There is no telling. It may be a month or two months. I can't say."

Q. Did you take a sworn statement from Mrs. Jennie Kane at that time?—A. No; not at that time. Subsequently I again visited her and explained to her that what I was more or less interested in was acquiring some information, and I then read it back to her after she had dictated it to me. I secured a sworn statement later.

Q. Is this the original of the sworn statement, written in pen on yellow, lined paper?—A. Yes. This is in my handwriting
160 and this was taken while I was talking with Mrs. Kane. When I finished writing the statement I read it to her in detail and asked her if it was the truth and I swore her to it and she signed it before me.

Q. This typewritten document is a typewritten copy of the statement made by Mrs. Kane to you?—A. Yes.

(Thereupon the paper above referred to was marked as "Board's Exhibit 7" for identification.)

Mr. HALLORAN. I am offering in evidence, Mr. Trial Examiner, the original statement given by Mrs. Kane to Field Examiner Shooer, and sworn to on the 21st of May 1944. And, if it is admitted in evidence, I will ask permission to withdraw it immediately and submit a copy of the said statement.

Mr. Moch. Evidently this is going to go on a little while longer. I want to examine that statement. May I have about a 60-second adjournment in order to make a phone call?

Trial Examiner Bellman. Yes. If this phone call is in order to cancel another appointment and continue, I can give you a few minutes recess.

Off the record.

(Discussion off the record.)

On the record.

Mr. Moch. Do I understand this is a copy?

Mr. Halloran. That is a copy of the written document.

161 Trial Examiner Bellman. Off the record.

(Discussion off the record.)

On the record.

Mr. Halloran. I offer the original statement and a copy of the same in evidence.

Mr. Moch. I object on the ground that there is no opportunity to cross-examine Mrs. Kane in connection with this affidavit.

Trial Examiner Bellman. You wish to submit a typewritten copy in lieu of the original?

Mr. Halloran. I ask permission to submit a typewritten copy in lieu of the original.

Trial Examiner Bellman. I will overrule the objection.

Mr. Moch. Note my exception.

Trial Examiner Bellman. Your exception is automatic. The document is admitted as "Board's Exhibit 7."

(The document heretofore marked as "Board's Exhibit No. 7" for identification was received in evidence.)

Mr. Halloran. That is all the evidence from the Board at this time.

Trial Examiner Bellman. Before you rest your rebuttal, are there further questions by the union?

Mr. Roewer. No questions.

Trial Examiner Bellman. You may cross-examine, Mr. Moch.

Cross-examination by Mr. Moch:

162 Q. When you talked to Mrs. Kane on April 23——A. May 23.

Q. Prior to writing out this statement (Board's Exhibit 7) did you tell her the result of the election?—A. She knew the result of the election.

Q. She knew the result of the election?—A. Yes.

Q. Did you tell her that the result of that election would probably hinge upon her vote?—A. No. I said the company was objecting to the election on the basis of her being an ineligible employee.

Q. She knew the company was objecting to her vote on the basis of her being ineligible or, as I would rather put it, on the basis of her being a nonemployee?—A. That is right.

Q. Did you tell her that she could get unemployment compensation if she was out sick?—A. No. That is not what I said.

Q. Did you tell her she could get unemployment compensation if she was out and was not sick?—A. I told her she was mistaken in her opinion so far as unemployment compensation benefits were concerned, in thinking if she was out sick she was entitled to something.

Q. Indicating that if she was sick she was not entitled to
163 unemployment compensation?—A. That is right.

Q. Did she tell you she had voted for the union?—A. No. She told me that she had favored the union. I said, "I am not interested in how you voted." She said, "All I indicated to the company officials was that I favored the union; I said the union was a good thing, but I didn't tell them I voted for the union so far as the ballot was concerned." Nor did she reveal that fact to me.

Q. She told you she was in favor of the union?—A. She said she thought the union was a good thing and that she favored the union, but she didn't say that she voted for the union, nor was the question asked.

Q. Did you draw to her attention the statement which Mr. Elbery and Mr. Hession secured from her and that she signed?—A. I did draw her attention to the statement.

Q. Did you draw her attention to the fact that she signed it?—A. I did.

Q. In the face of that she said she did not sign it?—A. She did not make any statement of that kind. She said she did sign it, but several things that she had said were not included in the statement submitted by the company.

Q. She did not say that statement was a wrong statement?—A. She said that statement was misconstrued so far as the language was concerned.

164 Q. She said it was misconstrued?—A. Yes.

Q. That misconstruction was in connection with where she said: "I applied for Social Security benefits because of this." And she goes on to say, "but the sentence should have been continued to show it was because of my sickness and not infer that I had left the company because the work was too heavy"?—A. Definitely.

Q. The net result is that she had no remarks to make counteracting the statement that is already in evidence (Respondent's Exhibit 2), which says that she "voted for the union at the election"? She did not counteract that at all?—A. She did.

Q. I thought you said the only thing she said was that her statement was misconstrued?—A. Parts of the statement were misconstrued, and, secondly, I said that she did not say that she said specifically that she voted for the union.

Q. Did she say that she did not write out or sign that statement that said she did [referring to Respondent's Exhibit 2]?—A. She said she didn't say that particular sentence that "I voted for the union."

Q. She said she did not say that particular sentence?—
165 A. She said she did not say it.

Q. Are you trying to tell the Trial Examiner that she said she didn't sign a statement with that statement in it?—A. She signed a statement not realizing what she was signing.

Q. She read this statement (Respondent's Exhibit 2)?—A. She read that statement and it was reread to her.

Q. She did not indicate that she did not read that statement?—A. She said to me that the other statement was read to her.

Q. Did she indicate to you that she did not read it?—A. She indicated to me that she hadn't read it.

Q. Did she tell you that she had not read it?—A. I don't recall her telling me that she hadn't read it.

Q. You are familiar with the Report on Objections?—A. More or less; yes.

Q. There are in quotes four paragraphs at the bottom of the page [indicating], all of these paragraphs are in quotations?—A. Yes.

Q. You are the agent referred to in the second paragraph [referring to Board's Exhibit 3-E]?—A. Yes.

Q. Those words that are within the quotations purport to be assertions by Mrs. Kane?—A. In fact I believe they are copied from the affidavit submitted by Mrs. Kane, taken in my
166 presence and sworn to before me.

Q. Did she actually assert those very identical words to you?—A. Well, if you mean the language, the identical language?

Q. Yes.—A. I should say No.

Q. Although it is in quotation marks?—A. It is in quotations.

Q. Indicating that she did assert?—A. I do not know what it did indicate. It indicates just what it means.

Q. She did not assert orally, in exactly those words, at any time while you were there?—A. I wouldn't say that.

Q. She did assert those same words orally?—A. She asserted the words but she didn't use the language identically.

Q. She did not use that identical language?—A. I believe she used that identical language. There are a few phrases in there which are my own terminology in explaining what she was saying.

Q. All I am trying to do is to find out whether she actually said exactly what it says right there, not in meaning, but exactly.—A.

I should say that 95 percent of what is written there
167 is exactly what she said right there.

Q. I wish you would answer the question.—A. I am trying to.

Mr. HALLORAN. Aren't we quibbling over something? Even though there may have been a ten-syllable word there that she could not conceivably have uttered, doesn't it remain that she adopted it when she signed the affidavit?

By Trial Examiner BELLMAN:

Q. Does the witness know whether the quotation marks, which appear in the Regional Director's report, are quotation marks intended to indicate a verbatim transcription of Mrs. Kane's words or are quotation marks intended to indicate quotations from the statement which has been put in evidence?—A. I believe the latter is true, that they are quotations from the statement put in evidence (Board's Exhibit 7).

Q. Do you know whether the statement which was put in evidence and which was obtained in the method which has been described, was a verbatim transcription of the words falling from the lips of Mrs. Kane or was any part of her use of words interpreted in words of your own?—A. I attempted to take it down verbatim. I would question her on a certain phase of the investigation and she would answer, and I would write it down. I should say 90 percent of the words that appear in this affidavit (Board's Exhibit 7) are her own words, taken verbatim as she dictated it to me.

168 Q. Can you separate the 95 percent and the 5 percent?—A. I dont' believe she used the word "misconstrued." That is my special word. I don't see anything else in there (Board's Exhibit 7) which would be my own terminology.

By Mr. MOCH:

Q. You mean she started with the words "On April 28, 1944," and said all that [referring to Board's Exhibit 7]?—A. At one time or another.

Q. Without any interruption? You say that is what she said. I want to know whether that actually came out of her mouth?—A. Mr. Moch, I must explain the way these affidavits are secured.

Trial Examiner BELLMAN. I think the record shows how the affidavit was taken. The affidavit will indicate whether it was set up in conversation form, like the lines of a play, or whether it was put in paragraph form.

Do you think anything material can be developed by going further into this line of questioning?

Mr. MOCH. I am going to stop with that.

By Mr. Moch:

Q. While you were questioning Mrs. Kane did you have any conversation relative to her having her name placed upon the list of individuals available for jobs, with the United States Employment Service?—A. Yes.

169 Q. What was the nature of that conversation?—A. She said that when she went and applied for unemployment compensation they told her to go to the U. S. E. S. before they could send her any money.

Q. While you were there did she indicate to you that she was sick or ill?—A. She looked sick and she showed me her doctor's certificate and said she was sick.

Q. The doctor's certificate showed that she was not capable of doing any remunerative work?—A. I don't recall what it said. I have a copy of it in the file. I think it would speak for itself.

Trial Examiner Bellman. Off the record.

(Discussion off the record.)

On the record.

Are the parties all agreed that instead of putting in evidence the copy of the doctor's certificate to which the witness has testified, the contents thereof may be read in by the witness?

Mr. Halloran. The Board is agreeable.

Mr. Roewer. The union is agreeable.

Mr. Moch. That is correct.

Trial Examiner Bellman. Will you read from the file what the doctor's certificate said?

The Witness. The doctor's certificate was on the form
170 of a prescription blank generally used when you prescribe medicine or something and, after the usual form with an "R" and a tail on the "R," "Saavas E. Theodore, M. D." and his address, 407 Huntington Avenue, Boston, Massachusetts.

Then again we have the "R" with the tail over the bottom of the "R."

"To Whom It May Concern:

This is to certify that Mrs. Kane has been under my care because of general weakness, and I feel she cannot engage in any gainful occupation." And it bore the signature of the doctor, S. E. Theodore, and the date 3.31.44.

By Mr. Moch:

Q. While you were there did she indicate in any way that she was dangerously ill?—A. No. She said that she was feeling poorly.

Q. You stated that when you first went to Mrs. Kane's she was alone, and later her daughter came in?—A. That is right.

Q. At what stage in your conversation did the daughter ap-

pear?—A. About the middle of the conversation. I was about half way through the interview when the daughter appeared on the scene.

Q. Did the daughter stay to the end of the conversation?—A. Yes. She went in and out of the room. I was sitting
171 in the parlor there.

Q. Most of the time you were alone with Mrs. Kane?—A. That is right; the first of the interview.

Redirect examination by Mr. HALLORAN:

Q. Was the daughter present at the time the affidavit was executed?—A. The affidavit was executed on the second interview and the daughter was present all the time during that, as well as Mrs. Kane's granddaughter and daughter-in-law.

Q. Three persons besides Mrs. Kane were present?—A. The daughter-in-law joined the group about half way through the examination of Mrs. Kane.

Mr. HALLORAN. I think that is all.

Trial Examiner BELLMAN. Any questions?

Mr. ROEWER. No questions.

Mr. MOCH. No questions.

Trial Examiner BELLMAN. The witness is excused.

(Witness excused.)

Is there any further rebuttal?

Mr. HALLORAN. No further rebuttal.

Trial Examiner BELLMAN. Does the respondent have anything further which it wishes to produce?

Mr. MOCH. No.

Mr. HALLORAN. At this time I move that the pleadings be amended to conform to the evidence so far as the amend-
172 ments concern ordinary incidents such as names, dates, and so forth, which do not tend to alter the substance of the complaint.

Trial Examiner BELLMAN. I believe you used the term "pleadings." I take it you mean both the complaint and the answer?

Mr. HALLORAN. That is correct.

Trial Examiner BELLMAN. Is there any objection?

Mr. MOCH. No objection.

Trial Examiner BELLMAN. I will grant the motion which was made, conforming the pleadings to the proof on such matters as Mr. Halloran has indicated.

As was indicated in an off-the-record discussion a while ago, I am not going to insist on oral argument at the close of the hearing because I believe the issues were argued with considerable elucidation, to me at least, in the period before the lunch recess.

If, however, any of the parties wish to make any closing points

omitted or to reiterate any points in view of the evidence, I will hear you at this time.

Does the Board have anything it wishes to add to the argument already on the record?

Mr. HALLORAN. No, sir.

Trial Examiner BELLMAN. Does the union?

Mr. ROEWER. No. We will submit a brief.

173 Trial Examiner BELLMAN. Does the respondent wish to add to the argument already on the record?

Mr. MOCH. No. We will likewise submit a brief.

Trial Examiner BELLMAN. I have already indicated that if you gentlemen wished to file briefs and would so indicate before the close of the hearing, you will be given an opportunity to do so.

I would like to have the briefs in the mail by a week from this coming Saturday, which gives you a little longer than usual. Get them postmarked by Saturday, August 12.

Does the respondent desire to file a brief?

Mr. MOCH. Yes, sir.

Trial Examiner BELLMAN. Does the Board?

Mr. HALLORAN. The Board will file a brief.

Trial Examiner BELLMAN. Does the union intend to file a brief?

Mr. ROEWER. We rserve the right to file one.

Trial Examiner BELLMAN. As I indicated earlier, these briefs are to be directed to the Trial Examiner in care of the Chief Trial Examiner, Washington, D. C.

There are no rules requiring that you exchange briefs beforehand or that you work out reply briefs but, of course, any courtesies you want to extend to each other you can work out among yourselves.

You should serve the other parties with copies of your

174 brief and send five copies to the Trial Examiner in care of the Chief Trial Examiner at Washington.

Does the Board have anything else to offer before the hearing closes?

Mr. HALLORAN. The Board has nothing further.

Trial Examiner BELLMAN. Has the union?

Mr. ROEWER. No, sir.

Trial Examiner BELLMAN. Or the respondent?

Mr. MOCH. No, sir.

Trial Examiner BELLMAN. The hearing is closed.

(Whereupon, at about 5:15 p. m. on August 3, 1944, the hearing in the above-entitled matter was closed.)

176 *Exhibit B-1*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST REGION

Case No. 1-C-2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. *6 L.)

COMPLAINT

It having been charged by Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), Boston, Massachusetts, that the A. J. Tower Company, hereinafter called the Respondent, has engaged and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter called the Act, the National Labor Relations Board, by the Regional Director for the First Region (Boston, Massachusetts), as agent of the Board designated by National Labor Relations Board Rules and Regulations—Series 3, Article IV, Section 1, hereby issues its Complaint and alleges the following:

1. The Respondent is, and has been at all times hereinafter mentioned, a corporation organized under and existing by virtue of the laws of the Commonwealth of Massachusetts, and is now, and has been at all times hereinafter mentioned, engaged at a place of business in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, in the manufacture and sale of waterproof oiled clothing, hats, and fabrics.

177 2. The Respondent, in the course and conduct of its business, causes and has continually caused a substantial part of the raw and other materials used by it in the manufacture of its waterproof oiled clothing, hats, and fabrics to be purchased and transported in interstate commerce from and through states of the United States other than the Commonwealth of Massachusetts to its plant in Boston, Commonwealth of Massachusetts, and causes and has continually caused a substantial part of the waterproof oiled clothing, hats, and fabrics manufactured by it to be sold and transported in interstate commerce from its plant in Boston, Commonwealth of Massachusetts, to, into, and through states of the United States other than the Commonwealth of Massachusetts.

3. Local #24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), is a labor organization within the meaning of Section 2, subdivision (5) of the Act.

4. All employees of the Company, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subdivision (b) of the Act.

5. On or about May 5, 1944, a majority of the employees in the unit described in Paragraph 4 above designated the Local #24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), hereinafter called the Union, as their representative for the purposes of collective bargaining with the Respondent. On or about said May 5, 1944, the Union was, and at all times thereafter has been, the representative for collective bargaining of a majority of the em-
178 ployees in said unit, and by virtue of Section 9, subdivision (a) of the Act was, and has been, and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

6. On or about May 25, 1944, and at all times thereafter, while the Respondent was engaged in the conduct of its business as set forth in Paragraphs 1 and 2 above, the Union, acting pursuant to its status as the exclusive representative of all the employees described in Paragraph 4 above, sought to bargain collectively with the Respondent in respect to matters pertaining to wages and other conditions of employment.

7. On or about June 6, 1944, and at all times thereafter, the Respondent did refuse to bargain collectively with the Union through its duly authorized agents on the matters which the Union sought to bargain on with the Respondent, as set forth in Paragraph 6 above.

8. By the acts of the Respondent set forth in Paragraph 7 above, the Respondent, by its officers, agents, and employees, interfered with, restrained, and coerced its employees, and is interfering with, restraining, and coercing its employees in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection; and by said acts, the Respondent, by its officers, agents, and employees, did engage in, and is engaging in, unfair labor practices

within the meaning of Section 8, subsection (1) of the Act.

179 9. By the acts of the Respondent set forth in Paragraph 7 above, the Respondent, by its officers, agents, and employees has failed and refused, and is failing and refusing, to bargain collectively with the Union, and has thereby engaged in, and is thereby engaging in, unfair labor practices within the meaning of Section 8, subsection (5) of the Act.

10. The activities of the Respondent, as set forth in Paragraph 7, occurring in connection with the operations of the Respondent described in Paragraphs 1 and 2 above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11. The aforesaid acts of the Respondent, hereinabove described, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (5), and Section 2, subsections (6) and (7) of the Act.

Wherefore the National Labor Relations Board on this 24th day of July 1944, issues its Complaint against the A. J. Tower Company, Respondent herein.

[SEAL] A. Howard Myers,
A. HOWARD MYERS,
Regional Director for the First Region,
Old South Building, Boston, Massachusetts.

182 N. L. R. B. 29 (Revised 8-9-41).

UNITED STATES OF AMERICA

183 BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST REGION

Case No. 1-C-2416

Date Filed June 9, 1944

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)

Charge

June 9, 1944

Pursuant to Section 10 (*b*) of the National Labor Relations Act, the undersigned hereby charges that A. J. Tower Company, at

18 Simmons Street, Roxbury, Massachusetts, employing 275 workers in manufacture of raincoats and waterproof garments has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (5) of said Act, in that on or about June 6, 1944 and at all times thereafter, the said Company, by its officers, agents, and employees, refused to bargain collectively with the representatives of Local #24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), a labor organization chosen by a majority of its employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment; and

By the acts set forth in the paragraph above, and by other acts and conduct, the said Company, by its officers, agents, and employees, has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)
888 Washington Street, Boston, Mass.

George E. Roewer,
By: GEORGE E. ROEWER, *Attorney.*
20 Pemberton Square, Boston, Massachusetts, Cap. 7010.

Subscribed and sworn to before me this 9th day of June 1944 at Boston, Massachusetts.

William I. Shooer,
WILLIAM I. SHOOER,
Field Examiner, N. L. R. B., 1st Region.

183 BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST REGION

Case No. 1–C–2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. OF L.)

Respondent's answer

And now comes the A. J. Tower Company, hereinafter called the Respondent, and for answer in the above entitled case denies that it has engaged or is now engaging in any unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter called the Act. And in further answering to the complaint:

1. The Respondent admits the allegations contained in paragraph one of the complaint.

2. The Respondent admits the allegations set out in paragraph two of the complaint.

3. The Respondent is without knowledge as to the facts set out in paragraph three of the complaint.

4. The Respondent denies that the employees set out in paragraph four of the complaint constitute a unit appropriate for the purposes of collective bargaining within the meaning of section 9, subdivision (b) of the Act.

5. The Respondent denies each and every allegation set out in paragraph five of the complaint. And answering further the Respondent alleges that Local No. 24, Waterproof Garment Workers Union, Affiliated with International Ladies' Garment

184 Workers Union, (A. F. of L.) hereinafter called the Union, has never been designated as the representative of a majority of the Company's employees in any appropriate unit for the purpose of collective bargaining with the Respondent. The Respondent also alleges that the Union is not and never has been the representative for collective bargaining of a majority of the Respondent's employees in any appropriate unit.

And answering further the Respondent alleges the following: A consent election was held May 5, 1944, for the purpose of determining whether or not the employees designated in an Agreement for Consent Election, executed and approved April 27, 1944, desired to be represented by the Union. In determining the results of this election one ballot was not counted because it was challenged by the Union. This challenge was not and has not been passed upon. Also one ballot, which was counted, was cast for

the Union by Mrs. Jennie A. Kane, who was not and has not since been an employee of the Respondent. Inasmuch as Mrs. Kane was not an employee of the Respondent at the time of the consent election her ballot should not be counted as a vote cast for the Union. If the Union's challenge, above mentioned, is not sustained and the challenged ballot upon being opened for the purpose of counting proves to be a vote against the Union, and if Mrs. Kane's ballot is not counted, as it should not be, the result of the election is a tie and the Union has not been designated the collective bargaining representative of the majority of the employees involved.

6. The Respondent admits that on or about May 25, 1944, while the Respondent was engaged in the conduct of its business as set forth in paragraph one and two of the compiaint, the Union sought to bargain collectively with the Respondent in respect to matters pertaining to wages and other conditions of employment; but the Respondent denies that the Union was acting pursuant to any status as an exclusive representative of any employees of the Respondent.

185 7. The Respondent admits that it has refused to bargain collectively with the Union. And answering further, the Respondent explains that it has refused to bargain collectively with the Union because the Union has not been validly chosen as the bargaining agent of the majority of the Respondent's employees in an appropriate bargaining unit, which refusal is the Respondent's right.

8. Paragraph eight of the complaint does not set forth any facts and therefore the Respondent is not called upon to admit or deny or explain any of the allegations set forth in that paragraph. The Respondent, however, denies each and every allegation set forth in paragraph eight of the complaint.

9. Paragraph nine of the complaint does not set forth any facts and therefore the Respondent is not called upon to admit or deny or explain any of the allegations set forth in that paragraph. The Respondent, however, admits that it has refused and is refusing to bargain collectively with the Union but it denies that it has thereby engaged in or is thereby engaging in unfair labor practices under the meaning of section 8, subsection (5) of the Act.

10. Paragraph ten of the complaint does not set forth any facts and therefore the Respondent is not called upon to admit or deny or explain any of the allegations set forth in that paragraph. However, the Respondent denies each and every allegation set forth in paragraph ten of the complaint.

11. Paragraph eleven of the complaint does not set forth any facts and therefore the Respondent is not called upon to admit or deny or explain any of the allegations set forth in that para-

graph. However, the Respondent denies each and every allegation set forth in paragraph eleven of the complaint.

185–A Wherefore, the Respondent prays that the complaint be dismissed.

A. J. Tower Company.
By F. A. Newman.

A. J. Tower Company,
Vernon and Simmons Sts.,
Boston 20, Massachusetts.

Subscribed and sworn to before me this first day of August. 1944.

[SEAL] Robert G. Moch,
Notary Public.

186 *Exhibit B–2*

United States of America

Before the National Labor Relations Board

First Region

Case No. 1–C–2416

In the Matter of A. J. Tower Company *and* Local #24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.)

Stipulation

It is hereby stipulated by and between the A. J. Tower Company and the National Labor Relations Board that the following facts may be received in evidence on behalf of any of the parties to this stipulation with the same force and effect as if properly qualified witnesses were called before the Board and gave under oath sufficient and competent evidence of each of the matters and things hereinafter set out, but without prejudice to the right of the National Labor Relations Board, the A. J. Tower Company or any party hereto to object to the materiality or relevance of such facts.

The Company and its Business

The A. J. Tower Company was incorporated under the laws of the Commonwealth of Massachusetts in 1926. It is engaged in the business of manufacture and sale of waterproof oiled clothing, aprons, hats and fabrics. The Company has one wholly owned subsidiary, the A. J. Tower Sales Company, a Massachusetts cor-

poration. The main office of the Company and its principal plant is located in Roxbury, Massachusetts.

The principal raw materials used in the Company's business are various cotton textiles, oils, threads, fastenings, and sun-
187 dries. During the calendar year 1943, in excess of $1,000,-000 was expended for raw materials, approximately 90% of which was shipped from points outside the Commonwealth of Massachusetts.

The dollar value of finished products during 1943 was in excess of $2,500,000, of which approximately 95% was transported to points outside the Commonwealth of Massachusetts. During the said year 1943 $2,250,342.08 of the Company's output went to various departments of the United States Government.

THE UNION

Local #24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.) is a labor organization within the meaning of the National Labor Relations Act and admits to membership certain employees of the Company.

THE ELECTION AND CERTIFICATION

On or about April 24, 1944, the Union, hereinabove referred to, filed with the First Region Office of the Board a Petition for Certification of Representatives under Section 9 (c) of the Act, seeking representation for certain employees of the Company. Subsequent thereto, to wit, on April 27, 1944, Agreement for Consent Election was entered into, providing for an election to be held on May 5, 1944, to determine whether or not the Union was desired as bargaining agent by employees in the following unit:

"All employees of the Company, at the Roxbury plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees."

On May 5, 1944, the said election was held under the supervision of a Board Agent. Both the Company and the Union had observers present during the balloting and during the counting and tabulation of ballots. There were approximately 250 eligible voters; 230 votes were counted; 116 votes were cast for the
188 Union and 114 against the Union; there was one ballot challenged by the Union.

On May 9, 1944, the Company, by its attorney, filed certain objections to the conduct of the election. A conference for the purpose of considering the objections was held on May 12, 1944, and a hearing on the objections was held on May 22, 1944, at which

were present representatives of the Company, the Union and the Board.

On May 24, 1944, the Regional Director issued his Report on objections, overruling the Company's objections and certifying the Union as bargaining agent for the employees in the unit hereinabove referred to. The Company duly received a copy of the said Report on Objections. On May 31, 1944, the Regional Director amended Paragraph 3 on Page 3 of said Report on Objections, notice of said amendment being duly received by the Company.

REQUEST TO BARGAIN AND REFUSAL

Under date of May 25, 1944, counsel for the Union directed a letter to the Company requesting a conference for the purpose of discussing a collective bargaining agreement to cover employees in the designated unit. A copy of this letter was sent to the attorney for the Company. Both the Company and the Company's attorney received the communications.

On June 6, 1944, the Company, by its attorney, sent a letter to the attorney for the Union stating that it was unwilling to enter into collective bargaining conferences until the Union shall have been validly chosen as the bargaining agent of the majority of the employees in the unit in which the election was held.

By ROBERT G. MOCH,
Attorney for A. J. Tower Company.

NATIONAL LABOR RELATIONS BOARD,

By WM. J. HALLORAN, *Attorney.*

Assented to by George E. Roewer, attorney for Union (Local 24, I. L. G. W. U.).

Dated Aug. 2, 1944.

189 NLRB-36a (Revised 11-8-43).

Exhibit B-3-A

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

FIRST

PETITION FOR CERTIFICATION OF REPRESENTATIVES

The undersigned Petitioner hereby alleges that the Employer named below has refused to recognize Petitioner as the exclusive

collective bargaining agent of all the employees in the bargaining unit hereinafter described and that such refusal has given rise to a question concerning representation affecting commerce within the meaning of the National Labor Relations Act. Pursuant, therefore, to Section 9 (c) of said Act, Petitioner requests the National Labor Relations Board to investigate such controversy and certify to the parties the name or names of the representatives designated or selected by the employees.

Do not write in this space—Case No. 1–R–1880. Docketed_____.

1. Name of employer, A. J. Tower Co.
2. Address of establishment, 22 Simmons Street, Roxbury, Mass.
3. Industry, manufacturers of oil clothing and rain-wear outer garments.
4. Petitioner, Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.).
5. The alleged appropriate bargaining unit includes all employees of the Company at the Roxbury plant, except for executives, foremen, assistant foremen, floor girls, maintenance employees, janitors, engineers, firemen and watchmen, office and clerical employees, shipping and packing room employees, and folding room employees.
6. The Unit contains approximately 190 employees, of which number majority have designated or selected petitioner as their bargaining representative.
7. The following individuals or labor organizations claim to represent employees in the Unit:

By (S) Nathan H. Barker,
NATHAN BARKER, *Manager*,
888 Washington Street, Boston, Mass.

Subscribed and sworn to before me this 24th day of April 1944, at Boston, Massachusetts.

(S) William I. Shooer,
WILLIAM I. SHOOER,
Field Examiner, NLRB—1st Region.

190

Exhibit B-3-B

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF A. J. TOWER CO.

Case No. 1-R-1880

AGREEMENT FOR CONSENT ELECTION

The undersigned Employer (herein called Employer) and the undersigned labor organization(s), subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director and the Board respectively), hereby agree as follows:

1. Secret ballot—An election by secret ballot shall be conducted under the supervision of the Regional Director, among the employees in the Unit defined below, at the indicated time and place, to determine whether or not the employees desire to be represented by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

Time and place of election—Friday, May 5, 1944, between 1:30 P. M. and 3:30 P. M. (place to be decided by agreement).

2. The unit—All employees of the Company, at the Roxbury plant except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees (herein called the Unit) constitute a unit appropriate for the purposes of collective bargaining.

3. Eligible voters—The eligible voters shall be those employees included within the Unit, who appear on the Employer's pay roll for the period indicated below, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or rein-

stated prior to the date of the election. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

Pay-roll period for eligibilty—April 21, 1944.

4. Names on ballot—In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot:

5. Notices of election—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligibile voters.

6. Observers—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally. As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to an observer designated by each party for such purpose.

7. Objections, challenges, reports thereon—Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon.

8. Consent determination of representatives—The Regional Director shall, if and when appropriate, issue a Consent Determination of Representatives to the parties, setting forth the name of the labor organization which has been designated and selected

as the exclusive representative of all the employees in the Unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

9c Run-of procedure—In the event that one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Regional Director shall conduct a run-off election at a time and *place to be determined* by him. Said run-off election shall be in accordance with Article III, Section 11 (b) and (c) of the Board's Rules and Regulations.

LOCAL NO. 24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH THE INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)
By (S) ALBERT FRAIOLI, *Asst. Mgr.*

A. J. TOWER CO.,
By (S) F. A. NOONAN, *Gen. Mgr.*

Recommended:

(S) James J. McFadden,
JAMES J. MCFADDEN,
Field Examiner National Labor Relations Board.

Date executed April 27, 1944.
Date approved April 27, 1944.

(S) A. Howard Myers,
A. HOWARD MYERS,
Regional Director National Labor Relations Board.

191 NLRB-216A (6-1-44).

Exhibit B 3-C

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
FIRST REGION

CERTIFICATION ON CONDUCT OF ELECTION

Name of employer, A. J. Tower Co. Case No. 1-R-1880.
Date of election, May 5, 1944. Place, Roxbury, Massachusetts.
The undersigned acted as agents of the Regional Director and as authorized observers, respectively, in the conduct of the balloting at the above time and place.

We hereby certify that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots

in secret, and that the ballot box was protected in the interest of a fair and secret vote.

For A. J. Tower Co.:

(S) CHARLES KISSOCK.
(S) HELEN CONSIDINE.

For the Regional Director, 1st Region:

(S) W. I. SHOOER.

For Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.):

(S) CATHERINE DUNN.
(S) MABEL BEDARD.

192 NLRB-317 (11-8-43).

Exhibit B-3-D

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CONSENT ELECTION

Case No. 1-R-1880

Date issued 5/5/44

In the Matter of A. J. TOWER CO. *and* LOCAL NO. 24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH THE INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. OF L.)

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

Approximate number of eligible voters	250
Valid votes counted	230
Votes cast for Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.)	116
Votes cast against participating union	114
Challenged ballots	1
Void ballots	0

A majority of the 231 valid votes and challenged ballots, which together are the basis for a majority, have been cast for Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies' Garment Workers Union (A. F. of L.).

Challenges are (not) sufficient in number to affect the results of the election.

For the Regional Director:

(S) W. I. SHOOER.

5/5/44.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

(S) HELEN CONSIDINE.

For A. J. Tower Co.:

For Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies' Garment Workers Union (A. F. of L.):

(S) NATHAN H. BARKER.

193 *Exhibit B-3-E*

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

FIRST REGION

Case No. 1-R-1880

In the Matter of A. J. TOWER CO. *and* LOCAL NO. 24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH THE INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. OF L.)

REPORT ON OBJECTIONS

Pursuant to the terms and provisions of the Agreement for Consent Election entered into by and between the parties in the above-entitled matter, the undersigned Regional Director of the National Labor Relations Board conducted an election by secret ballot on May 5, 1944.

On May 9, 1944, the Company sent a letter to the undersigned challenging the right of one Jennie A. Kane to vote in the election, challenging the ballot cast by her, and requesting a ruling on the one ballot reported as challenged in the Tally of Ballots issued in the above matter on May 5, 1944. In support of the request as to Mrs. Kane, the following facts were submitted:

"Mrs. Kane was employed by A. J. Tower Company from March 16, 1943, through March 24, 1944. After the latter date Mrs. Kane did not ever again report for work at the Tower Company

and did not appear at the plant of the Tower Company until she appeared for the purpose of voting on May 5, 1944. The Tower Company, not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote. It has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she 'could not continue to do heavy work of carrying bundles which was part of her job.' The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment."

194 "The Company contends that irrespective of any oversight or neglect on its part, the vote cast by Mrs. Kane was ineligible beyond question. It submitted a witnessed statement signed by her on May 8, 1944, stating that she 'left the employ of A. J. Tower Co. in March 1944, because of sickness and have been treated by Dr. Theodore who found that I was not able to engage in any gainful occupation. I applied for social security benefits because of this. I signed a paper for the Union at the Tower Co. as I felt it was a good thing. I voted for the union at the election on last Friday. I have not worked since leaving the Tower Co. because of my physical condition.'

"Subsequently interviewed by an Agent of the Board on May 23, 1944, Mrs. Kane asserted—'On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think that my application for unemployment benefits would be considered a termination from the Company. I am 64 years of age and have a certificate from my physician as to my general poor health. On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.

"On May 8, 1944, Mr. Ellberry of the Co. and another gentleman whose name I've forgotten visited me at my home and questioned me. I informed them that I thought the Union was a good thing but I do not recollect ever telling them exactly how I voted

at the election. I have read a copy of a statement that I signed on May 8, 1944, for Mr. Ellberry but my words have been misconstrued. I did say, I applied for social security benefits because of this, but the sentence should have been continued to show it was because of my sickness and not infer that I had left the Company because the work was too heavy.

"'Shortly after I took sick, I wrote a note to Miss Stone, in the office at the A. J. Tower Co., which Miss Higgins, a fellow employee, carried for me. In the note, I told Miss Stone that I was under a doctor's care and that I intended to return to the Company as soon as I was well.

"'Incidentally, when Mr. Ellberry was at my home on May 8, 1944, I told Mr. Ellberry that I intended to return to my job as soon as I was able and asked him would I get my job back or would he give me a release. Mr. Ellberry said I don't see why you need a release. This was in answer to my question, Would I need a release to obtain social security benefits? When I sought social security benefits, it was something I thought to which I was entitled because of my illness; so I had been told by several of my friends. I did not think that it would be considered quitting my job at the A. J. Tower Co. because naturally I intended to go back to the Co."

195 Subsequent investigation confirmed the fact that Mrs. Kane did advise the Division of Employment Security of the Commonwealth of Massachusetts on April 28, 1944, that she had left her employment with the Company in March and that the reason stated was her inability to do heavy work of carrying bundles.

A Notice to Employer of Claim Filed was sent to the Company by the U. S. Employment Service on May 1, 1944, the same day on which the Company submitted "a complete list of employees of the A. J. Tower Co. on the pay roll of April 21, 1944, who were in the unit designated in the consent agreement for an election to be held May 5, 1944."

The Company contends that it does not know the exact date of receipt of the notice of claim, but concedes that it was undoubtedly received prior to the day of the election, and that it failed through oversight to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls. (See letter to Noonan 5/31/44.)

The Board Agent conducting the election reports that he followed the usual practice of instructing the observers at the election, including the two Company representatives, Helen Considine and Charles Kissork, who were accompanied by the Company counsel, of their right to challenge the ballot of any person believed ineligible to vote. These observers were present when Mrs.

Kane cast her ballot and did not challenge her right to vote. Prior to the count of the ballots, the Company tellers conferred with the Company counsel when asked to certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to vote their ballots in secret. After approval by counsel, both signed the usual Certification on Conduct of Election.

The fact remains that the list of eligible voters was prepared solely by the Company and was submitted by them as the exclusive list of eligible voters. Four or five days prior to the election, the Company knew, by reason of a letter from the U. S. Employment Service, that Mrs. Kane had made an application for unemployment compensation. It is this application that the Company urges as a basis for determining that she was not an employee at the time of the election and therefore not entitled to vote; yet not only did it do nothing to correct the eligibility list, but it did in fact acquiesce in her casting a ballot. Whether or not Mrs. Kane was an employee entitled to vote was, under the circumstances a fact peculiarly within the Company's knowledge. Yet it was not until four days after the election that they raised any objection to her vote.[1]

Although the question of Mrs. Kane's status as an employee is not quite clear, the undersigned is of the opinion that under the circumstances set forth the Company has waived its right to challenge her vote or to object to the election on this ground.[2]

196 To hold otherwise would vitiate the Board's procedure of having observers present at the polls, of challenges by such observers, and of certifications of conduct by the parties.

Since the overruling of this point makes unnecessary a ruling on the vote challenged at the election, the undersigned finds that a majority of the valid votes have been cast for the Union indicated below. Pursuant to Section 8 of the Agreement for Consent Election the undersigned hereby finds and determines that Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.) is the exclusive representative of all the employees in the unit defined in Section 2 of the Agreement for Consent Election, for the purposes of bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Boston, Massachusetts, this 24th day of May 1944.

[S] A. HOWARD MYERS,
Regional Director,
National Labor Relations Board.

[1] See N. L. R. B. v. Capitol Greyhound Lines, et al., No. 9502 U. S. C. C. A. 6th; decided January 31, 1944.

[2] See in re American Granite Finishing Company and International Union of Operating Engineers (XXVIII NLRB 739).

197 MAY 31, 1944.

JOHN T. NOONAN, *Esquire*,
Herrick, Smith, Donald, Farley & Ketchum,
1 Federal Street, Boston, Massachusetts:

Re: A. J. Tower Co.—Case No. 1–R–1880

DEAR MR. NOONAN: This is to acknowledge your letter of May 26, 1944, the contents of which I have considered.

In view of your objection, I am hereby amending Paragraph 3 on Page 3 of the Report on Objections to read as follows:

"The Company contends that it does not know the exact date of receipt of the notice of claim, but does not deny that it was received prior to the date of the election, and in the opinion of the undersigned it failed, through oversight, to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls."

Very truly yours,

A. HOWARD MYERS,
Regional Director.

cc: A. J. Tower Co., Boston, Mass.
Local No. 24, WGWU (AFL), Boston, Mass.
George E. Roewer, Esquire, Boston, Mass.

198 *Exhibit B–4–A*

MAY 25, 1944.

A. J. TOWER CO.
18 Simmons Street,
Roxbury, Mass.

Attention: Mr. Newman

GENTLEMEN: In view of the fact that Local 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union, has now been certified as the exclusive representative of all employees in the unit which participated in the election on May 5th, we hereby request, as attorneys for Local 24 and the International Ladies Garment Workers Union, an early conference between the representatives of the management and representatives of the union in order to take up with you the terms of a collective bargaining agreement covering wages, hours and working conditions.

We shall be glad to arrange our time to suit your convenience, but would suggest that the conference be held at an early date. Will you please notify Mr. Jacob Halpern, 888 Washington Street,

Boston, tel. Lib. 4108, or the writer, as to time and place when it will be convenient for you to meet a representative of the union.

I am sending a copy of this letter to Mr. John T. Noonan for his information.

Very truly yours,

ROEWER & REEL,
By (S) GEORGE E. ROEWER,
Attorneys for the
International Ladies Garment Workers Union.

199 *Exhibit B-4-B*

HERRICK, SMITH, DONALD, FARLEY & KETCHUM

FIRST NATIONAL BUILDING

1 Federal Street

Boston 10, June 6, 1944.

Messrs. ROEWER & REEL
20 Pemberton Square,
Boston 8, Massachusetts.

Attention Mr. George E. Roewer

DEAR SIRS: Your letter of May 25, 1944, addressed to the A. J. Tower Company has been referred to me as counsel for the Company.

In the light of certain matters having to do with the election held on May 5, 1944, with which you are familiar, the Company does not believe that Local #24 Waterproof Garment Workers Union has been validly chosen as the bargaining agent of the majority of the employees in the unit in which the election was held. Accordingly, I am constraining to advise you that the Company is unwilling to enter into collective bargaining conferences with this Union until it shall have been validly so chosen.

Very truly yours,

(S) JOHN T. NOONAN.

200 *Exhibit B-5*

MISS STONE:

Will you please Give the Bearer Mrs. Higgins my Pay Tomorrow. and she can sign my slip and oblige

(S) JENNIE KANE
187

Thank you.

P. S. I am sick thats why I have not been in this week

201 *Exhibit B-6*

MAY 9, 1944.

Dr. A. HOWARD MYERS,
National Labor Relations Board,
Old South Building,
294 Washington Street, Boston, Massachusetts.

Re: A. J. Tower Company—Case No. 1-R-1880

DEAR SIR: Subsequent to the election which was held in the above matter on May 5, 1944, it came to the attention of the management of the Company that Mrs. Jennie A. Kane, one of the persons who voted at the election, was not at the time an employee of the Company.

The facts with respect to Mrs. Kane as I have been advised of them are as follows:

Mrs. Kane was employed by A. J. Tower Company from March 16, 1943, through March 24, 1944. After the latter date Mrs. Kane did not ever again report for work at the Tower Company and did not appear at the plant of the Tower Company until she appeared for the purpose of voting on May 5, 1944. The Tower Company, not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote. It has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she "could not continue to do heavy work of carrying bundles which was part of her job." The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment.

202 In the light of the above facts the Company hereby challenges the right of Mrs. Kane to vote in the election of employees at its plant and challenges the ballot cast by her.

In the election above referred to there was one ballot challenged by the Union which challenge was not passed on because it had appeared that the Uni ⌐ had won the election by two votes. In view of the fact that it would now appear that one person, not an employee of the Tower Company, had voted in this election, this ballot challenged by the Union may materially affect the final

election result. Accordingly, on behalf of the Company, I hereby request that a hearing be held for the purpose of passing upon this challenged ballot. If the challenge is not sustained and the ballot, upon being opened for the purpose of counting, proves to be a vote against the Union, it will become material to rule upon the challenge which the Company hereby makes to the vote of Mrs. Kane and the Company requests that a hearing upon such challenge be held.

Very truly yours,

(S) JOHN T. NOONAN.

JTN/KSJ.

203 *Exhibit B–7*

I, Mrs. Jennie A. Kane, 119 W. Brookline St., Boston, Mass., being duly sworn, depose and say: On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. *At no time*, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think that my application for unemployment benefits would be considered a termination from the Company. I am 64 years of age and have a certificate from my physician as to my general poor health. On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.

On May 8, 1944, Mr. Ellberry of the Company and another gentleman whose name I've forgotten, visited me at my home and questioned me. I informed them that I thought the Union was a good thing but I do not recollect ever telling them exactly how I voted at the election. I have read a copy of a statement that I signed on May 8, 1944, for Mr. Ellberry, but my words have been misconstrued. I did say "I applied for social security benefits because of this" but the sentence should have been continued to show it was because of my sickness and not infer that I had left the Company because the work was too heavy.

Shortly after I took sick, I wrote a note to Miss Stone, in the office at the A. J. Tower Co., which Miss Higgins, a fellow employee, carried for me. In the note, I told Miss Stone that I was under a doctor's care and that I intended to return to the Company as soon as I was well.

Incidentally, when Mr. Ellberry was at my home on May 8, 1944, I told Mr. Ellberry that I intended to return to my job as soon as I was able and asked him would I get my job back or would he give me a release. Mr. Ellberry said "I don't see why you need

a release." This was in answer to my question, "Would I need a release to obtain social security benefits?" When I sought social security benefits, it was something I thought to which I was entitled because of my illness; so I had been told by several of my friends. I did not think that it would be considered quitting my job at the A. J. Tower Co. because naturally I intended to go back to the Company.

(S) J. A. KANE.

Sworn to before me this 23rd day of May 1944 at Boston, Mass.

(S) W. I. SHOOER,
NLRB, Field Examiner.

204 NOTICE TO EMPLOYER OF CLAIM FILED

THE COMMONWEALTH OF MASSACHUSETTS,
Division of Employment Security
Social Security Account Number 029-10-4178.
Name Jennie A. Kane.
Address 119 W. Brookline St., Bos.
Date Claim Filed 4-28-44.
Last Occupation Stitcher.
Employer A. J Tower Co.
Address 33 Simmons St., Roxbury, Mass.
Notice mailed May 7, 1944, eff. wk. No. 5.
Date of Separation Mar. 1944. Reason for Separation Left—Couldn't continue to do heavy work of carrying bundles which was part of his job.

You are hereby notified that the above named individual has filed a claim with this division for unemployment benefits and has stated that you were his employer on the date of separation shown above.

If you know of any misrepresentation or other reason why payment of benefits should not be made to this claimant, you *must* under the law (G. L. 151A 438) complete this form and return it to the office location shown above within 7 days from the date appearing in the "notice mailed" block.

Payment of benefits to the individual named above may be affected by any one of the following reasons:

Left voluntarily without good cause attributable to the employer or his agent.
Sick or unavailable for work.
Suitable work now available.
Currently employed.

Discharged because of wilful misconduct.
Unemployed because of a labor dispute.
Receiving workmen's compensation, dismissal pay, vacation allowance, or Federal old age insurance.

These or Other Reasons Affecting the Claim Should be Detailed Below

If you return this form you will be notified only if benefits are awarded to the claimant, and you will have the right to apply for a review of the determination at that time.

DIVISION OF EMPLOYMENT SECURITY,
ROBERT E. MARSHALL, *Director.*

The following person in our organization may be called for further information, if necessary, relative to this claim.

205 *Exhibit R-2*

MAY 8, 1944

I hereby certify that I left the employ of A. J. Tower Co. in March 1944 because of sickness and have been treated by Dr. Theodore who found that I was not able to engage in any gainful occupation. I applied for social security benefits because of this. I signed a paper for the union at the Tower Co. as I felt it was a good thing. I voted for the union at the election on last Friday. I have not worked since leaving the Tower Co. because of my physical condition.

I have read the foregoing statement and it is correct.

J. A. KANE.

Witness:
W. J. HESSION.

206 In United States Circuit Court of Appeals,
Sixth Circuit

Minute entries

On June 15, 1945, a certified copy of the transcript of record was filed and leave was granted to proceed under Rule 24.

Thereafter, to wit, on November 7, 1945, this cause came on to be heard, and was fully heard by the Court, Honorable John C. Mahoney, Honorable Peter Woodbury, and, by special assignment, Honorable Albert Lee Stephens, Circuit Judges, sitting.

Thereafter, to wit, on December 13, 1945, the following opinion of the Court was filed:

207 In United States Circuit Court of Appeals for the First Circuit

No. 4099—October Term, 1945

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY, RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board

Before ALBERT LEE STEPHENS, MAHONEY, and WOODBURY, JJ.

Malcolm Halliday, Associate General Counsel, Louis Libbin, Attorney, for Petitioner. John T. Noonan, for Respondent.

Opinion of the court

December 13, 1945

MAHONEY, J. This case comes before us on petition of the National Labor Relations Board, hereinafter referred to as the Board, for enforcement of its order issued against A. J. Tower Company, hereinafter referred to as the Company, pursuant to § 10 (c) of the National Labor Relations Act (49 Stat. 452; 29 U. S. C. A. § 160) requiring the respondent to cease and desist from refusing to bargain with Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment 208 Workers Union (A. F. of L.) hereinafter referred to as the Union, "as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant * * *".

On April 27, 1944, the Company and the Union executed an agreement for a consent election. In accordance with the agreement the Company furnished the Regional Director of the Board, who was to conduct the election, with its pay roll list for April 21, 1944, the pay roll date contained in the agreement for the determination of eligible voters. Included in this list was the name of Jennie A. Kane with the notation that she was "Out Sick". There was evidence to the effect that this employee had last worked for the Company on March 24th and had not entered the plant from then until May 5, 1944, the date of the election, at which time she voted. Although the Company had observers present at the polls for the purpose of challenging questionable voters,

her vote was not challenged and her ballot was commingled with the others.

When the pay roll list was furnished, the Company officials had no knowledge that Mrs. Kane had severed her employment but believed that her absence from work was due to illness. The Company was still under that belief at the time of the election and for that reason did not challenge her vote. After the election a "Certification on Conduct of Election" was signed by representatives of the Company, the Union and the Board, certifying that the balloting had been held, that it was fairly conducted, and that all eligible voters were given an opportunity to cast their ballots secretly. The tabulation of the ballots disclosed that 231 votes were cast, 116 being cast for the Union and 114 against it, and one ballot had been challenged by the Union. The Board's Regional Director certified that a majority of ballots had been cast for the Union and that there were not challenges sufficient in number to affect the result of the election, so that it was
209 unnecessary to consider the validity of the ballot challenged by the Union. Hence on this appeal we must assume that the last-mentioned ballot was a valid vote and that it was cast against the Union. Thus, for our purposes, the total vote against the Union was 115, the total vote for the Union, 116, of which Mrs. Kane's vote is one. And so, if Mrs. Kane was not eligible to vote, the result might have been a tie. Although there is no reliable method of determining for whom Mrs. Kane voted, since her ballot was commingled with the other 230 ballots, we must assume that she voted for the Union. In fact, there was evidence to that effect.

Evidence before the Trial Examiner showed that the Company officials, within a few days after the election, learned that Mrs. Kane had applied for unemployment benefits and that the Company's files contained a notice from the Division of Employment Security for the Commonwealth of Massachusetts stating that Mrs. Kane had applied for unemployment benefits on April 28, 1944, and gave the date of the severance of her employment with the Company as March 1944. This was the first time the notice had come to the attention of a supervisory official of the Company. The Company on May 9th filed with the Regional Director an objection to his basing any determination of representatives upon Mrs. Kane's ballot since she was not an employee at the time she voted.

The Regional Director filed a report on these objections but did not make a finding as to whether Mrs. Kane was an employee at the time she voted and held that the Company could not challenge her vote after the election since the consent election agreement provided for the challenging of the eligibility of individual

voters only at the time of the balloting. The Regional Director then certified the Union as exclusive representative of all the employees. The Company thereafter refused to bargain with the Union on the ground that the Union had not been validly
210 chosen as the bargaining agent of a majority of the employees. The Board, upon a charge filed by the Union, issued a complaint alleging that the Company was engaging in unfair labor practices. A hearing was held before a Trial Examiner and his conclusion that the Company had lost its right to challenge the status of Mrs. Kane and was therefore guilty of an unfair labor practice under § 8 (1) and (5) of the Act was affirmed by the Board and the order which the Board here seeks to enforce was then issued.

The issues before us are: (1) whether the Board had jurisdiction to find the Company guilty of an unfair labor practice for refusing to bargain with the certified representative of the employees; and (2) whether the Company had waived its right to challenge the vote of Mrs. Kane.

The provisions of the consent election agreement with which we are here concerned are set forth below.[1] This agreement was approved by the Board's Regional Director.

---

[1] "Agreement for Consent Election

The undersigned Employer (herein called Employer) and the undersigned labor organization(s), subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director and the Board respectively), hereby agree as follows:

"1. Secret Ballot.—An election by secret ballot shall be conducted under the supervision of the Regional Director among the employees in the Unit defined below, at the indicated time and place, to determine whether or not the employees desire to be represented by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

• • • • • •

"3. Eligible Voters.—The eligible voters shall be those employees included within the Unit, who appear on the Employer's pay roll for the period indicated below, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

• • • • • •

"6. Observers.—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally. • • •

"7. Objections, Challenges, Reports Thereon.—Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after the issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon."

211 The Company urges that it is not guilty of the unfair labor practice of refusing to bargain with the representative certified by the Board since the Union was not selected as the bargaining agent by a majority of the employees in the designated unit, and that neither waiver nor estoppel can enlarge an unfair labor practice as defined by the National Labor Relations Act.

The Company's contention that the Union does not represent a majority of the employees depends upon its assertion that
212 Mrs. Kane was not an employee on the date specified in the election agreement. There is no evidence before us on this issue and neither the Trial Examiner nor the Board made any finding as to whether she had the status of an employee when she voted. The Trial Examiner and the Board held that because the Company had not challenged Mrs. Kane's vote at the time of the election it was estopped from contesting the validity of her ballot at any time thereafter. Although the parties are not in accord as to whether the consent election agreement permitted a challenge of an employee's ballot after the election, we do not find it necessary to consider that problem because of the view we take of the case.

Section 8 (5) of the Act makes it an unfair labor practice for an employer to refuse to bargain with the representative of his employees chosen by a majority of those employees. We do not believe that the Board has jurisdiction to find an employer guilty of such violation unless the Union with which he refuses to deal was chosen by a majority of the employees voting in the election. The Act does not give the Board or the Court power to compel an employer to deal with a union which was not selected by a majority of his employees. No theory of waiver or estoppel can be applied against an employer to confer jurisdiction upon the Board where the union with which the employer refuses to deal has not been chosen by a majority of the employees in the appropriate unit. Mooresville Cotton Mills v. N. L. R. B., 94 F. (2d) 61, 65 (C. C. A. 4th, 1938).

Sound considerations of public policy, in addition to the express language of the statute, compel this conclusion. Congress did not intend to sacrifice all the rights of the employees voting against the union. It preserved the right of these employees to make effective their disinclination to appoint a collective bargaining agent where their number constitutes one-half or more of
213 the total employees participating in the election. We do not feel that Congress intended to force a bargaining representative upon 115 employees who vote against such a representative when only 115 employees vote for it. Hence we conclude that the Board had no jurisdiction to find the Company guilty of violating § 8 (5) in the absence of a finding that Mrs. Kane was

an employee on the date stipulated. It is the duty of the Board to make a finding as to whether she was or was not an employee on April 21, 1944. If Mrs. Kane was an employee as of the date of the payroll list used to determine the eligibility of employees to vote in this election, then the Board will have jurisdiction to find the employer guilty of an unfair labor practice.

The Board urges that this case falls within the principles laid down in N. L. R. B. v. Capitol Greyhound Lines, 140 F. (2) 754 (C. C. A. 6th, 1944) cert. den. 322 U. S. 763. In that case an election was held under a consent election agreement, which provided, as in the instant case, that the determination of the Regional Director on all questions including eligibility of voters was to be final and binding. Several days after the election, the employer filed objections to the election, contending inter alia, that one Nolan was not entitled to vote as he was not an employee on the eligibility date designated by the agreement. The employer used the payroll list of August 15, in the belief that it was the same as that of July 31, the designated date. In fact, Nolan was hired after July 31, but before August 15, so that his name appeared on the August list but not on the July list. Nolan voted in the election and the employer did not challenge his vote at the polls. The Circuit Court sustained the Board's decision upholding the election. Although at first glance the factual situation in the Capitol Greyhound case would seem very close to the situation under consideration in the case at bar, a thorough study of
214 that case shows that there was no dispute as to the fact of Nolan's status as an employee. It was assumed that he became an employee after July 31st. The only dispute was as to the right of the employer to make a post election challenge. There was no question of jurisdiction. Since Nolan was admittedly an employee on the date of the election, it cannot be said that the Board was without jurisdiction to certify the Union as the bargaining agent of the employees. The statute gives the Board discretion to use any reasonable method it deems wise to determine whether a Union represents a majority of employees. Had the employer contested the fact of Nolan's employment as of the election and had the Board made no finding on that issue, the result in the Capitol Greyhound case might well have been different. While the Board has broad discretion in determining which group of employees is to constitute the bargaining unit and what qualifies an employee to vote, the Board has no power to tally the vote of one not an employee in determining whether the unit has received a majority vote. Insofar as any language of the Capitol Greyhound case may be inconsistent with the decision in the instant case, we feel that that language is too broad to be justified by the terms of the Act.

We do not now intend to pass on the validity of the consent election agreement as a whole, which the Board frequently uses as a means of administrative convenience and which undoubtedly facilitates the speedy determination of bargaining representatives and avoids the necessity of many lengthy and costly formal procedures by the Board. It is sufficient for the present to hold that the Board cannot confer upon itself a jurisdiction, which it does not have under the statute creating it, either by its own rules and regulations or by its approval of consent election agreements.

215 The Board undoubtedly has broad discretion to determine the manner in which the bargaining representative is to be designated. Southern S. S. Co. v. N. L. R. B., 316 U. S. 31, 37 (1942); N. L. R. B. v. Waterman S. S. Co., 309 U. S. 206 (1940); N. L. R. B. v. Falk, 308 U. S. 453, 458. And the Board may utilize any reasonable method it deems wise, so long as the procedure and rules it employs result in the choice of a bargaining representative by a majority of the employees in the designated unit. But the Board has no power to treat an employer's refusal to bargain with employees' representative as an unfair labor practice where that representative has not been seleceted by a majority of his employees. Mooresville Cotton Mills v. N. L. R. B., supra.

It is clear that the Board does not have the power to certify a union with which the employer has expressly agreed to bargain if that union does not represent a majority of the employees. How then can the employer confer jurisdiction, indirectly, on the Board by his agreement to the terms of an election which permit the bargaining representative to be designated by less than a voting majority of the employees in the unit?

Although the Act may not require that the certified representative be selected by a majority of all the employees, including those not voting, in the designated unit, the Act does require that the bargaining agent be chosen by a majority of those employees who do vote. The analogies the Board makes to corporate and political elections are not applicable to the instant case, since the powers of the Board are derived solely from the statute. We can construe its powers only in light of the statute creating it.

Because of the view we take of this case we find it unnecessary to pass on the correctness of the Board's interpretation of
216 the consent election agreement to the effect that it did not permit challenging of individual voters after the balloting.

The petition for enforcement of the order is denied and the case is remanded to the National Labor Relations Board for further proceedings not inconsistent with this opinion.

On the same day, to wit, December 13, 1945, the following Decree was entered:

In United States Circuit Court of Appeals

Decree

December 13, 1945.

This cause came on to be heard November 7, 1945, upon the record upon petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now, to wit, December 13, 1945, here ordered, adjudged and decreed as follows: The petition for enforcement of the order is denied and the case is remanded to the National Labor Relations Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court,

(S) ARTHUR I. CHARRON, *Clerk.*

* * * * *

217 [Clerk's certificate to foregoing transcript omitted in printing.]

218 Supreme Court of the United States

Order allowing certiorari

Filed May 6, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

219 In the Supreme Court of the United States

Stipulation as to printing record

Filed July 5, 1946

It is hereby stipulated and agreed by and between the parties hereto, in accordance with the provisions of Paragraph 8 of Rule 38 of this Court, that the following portions of the Transcript of the Record in the United States Circuit Court of Appeals for the First Circuit which was filed herein with the petition for writ of certiorari may be omitted from the record which is to be reprinted under the supervision of the Clerk of this Court:

1. Copy of order dated August 3, 1944, designating trial examiner.

2. Telegram dated August 9, 1944, granting request of counsel for respondent for extension of time within which to file briefs.

3. Order dated September 30, 1944, transferring case to the National Labor Relations Board.

4. Letter dated October 9, 1944, from counsel for respondent to Board requesting oral argument.

5. Telegram dated October 13, 1944, from counsel for respondent to Board requesting extension of time in which to file exceptions.

6. Telegram dated October 13, 1944, from Board to respondent granting an extension of time in which to file exceptions.

220 7. Notice of hearing before the National Labor Relations Board dated January 12, 1945.

8. Telegram dated January 18, 1945, from the attorney for the International Ladies' Garment Workers Union to the Board requesting change of the date designated for the hearing.

9. Notice of postponement of the date for the hearing.

10. Statement of appearance at the oral argument before the Board.

11. Affidavit dated March 23, 1945, as to the service of Board decision and order.

12. Notice of hearing dated July 24, 1944, being the first page of Board Exhibit No. 1 in Case No. 1–C–2416.

13. Affidavit dated July 26, 1944, as to service of complaint and notice of hearing, being the last page of Board Exhibit No. 1 in Case No. 1–C–2416.

Dated at Washington, D. C. this 3rd day of July 1946.

J. HOWARD MCGRATH,
Solicitor General of the United States.

Dated at Boston, Mass. this 28 day of June 1946.

JOHN T. NOONAN,
Counsel for A. J. Tower Company.

[Endorsement on cover:] File No. 50653. U. S. Circuit Court of Appeals, First Circuit. Term No. 60. National Labor Relations Board, Petitioner, vs. A. J. Tower Company. Petition for writ of certiorari and exhibit thereto. Filed March 13, 1946. Term No. 60 O. T. 1946.

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No. [redacted] 60

In the Supreme Court of the United States

OCTOBER TERM 1945

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and regulations involved	3
Statement:	
The representation proceeding	3
The unfair labor practice proceeding	9
Specification of errors to be urged	12
Reasons for granting the writ	13
Conclusion	26
Appendix	27

CITATIONS

Cases:

American Granite Finishing Co., Matter of, 28 N. L. R. B. 739	18
Bradley v. *Neill*, 174 La. 702, 141 So. 382	23
Cambre v. *Brignac*, 19 La. App. 437, 140 So. 702	23
Capitol Greyhound Lines, Matter of, 49 N. L. R. B. 156	18, 25
Chenango County Mutual Ins. Co., In re, 19 Wend. (N. Y.) 635	23
Chrysler Corp., Matter of, 63 N. L. R. B. No. 132	18
Cudahy Packing Co., Matter of, 4 N. L. R. B. 39	18
Denver Publishing Co., Matter of, 61 N. L. R. B. 338	18
Duplessis v. *Harrell*, 9 La. App. 171, 119 So. 264	23
Hyde v. *Brush*, 34 Conn. 454	23
International Freighting Co., Matter of, 6 N. L. R. B. 271	18
Kellogg Switchboard and Supply Co., Matter of, 28 N. L. R. B. 847	18
Kilburn Mills, Matter of, 48 N. L. R. B. 1251	18
Lane Cotton Mills Co., Matter of, 9 N. L. R. B. 952, enforced 111 F. 2d 814	18
Mahon Co., Matter of, 9 N. L. R. B. 430	18
Harry Manaster & Bro., Matter of, 61 N. L. R. B. 1373	18
Martinsburg & Potomac R. Co. v. *March*, 114 U. S. 549	23
McGrath, Re, 17 Ont. L. 514	23
Memphis Trust Co. v. *Brown-Ketchum Iron Works*, 166 Fed. 398, certiorari denied, 214 U. S. 515	23
Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387	23
Moore v. *Bay*, 149 Md. 286, 131 At. 459	22

Cases—Continued. Page

National Labor Relations Board v. *Capitol Greyhound Lines*, 140 F. 2d 754, certiorari denied, 322 U. S. 763.. 15, 24, 25
Norris, Inc., Matter of, 63 N. L. R. B. No. 78..... 18
Owens-Corning Fiberglas Co., Matter of, 61 N. L. R. B. 546.. 18
Perez v. *Cognevich*, 156 La. 331, 100 So. 444..... 23
Plumley v. *United States*, 226 U. S. 545..... 23
Port Arthur Provincial Election, Re, 14 Ont. L. 345..... 23
Rossing v. *State Bank*, 181 Ia. 1013, 165 N. W. 254..... 23
Schumacher, Re, 21 Ont. L. 522..... 23
Solvay Process Co., Matter of, 37 N. L. R. B. 983..... 18
Southern S. S. Co. v. *National Labor Relations Board*, 316 U. S. 31..... 19
Turregano v. *Whittington*, 132 La. 454, 61 So. 525..... 23
United States v. *Mason & Hanger Co.*, 260 U. S. 323..... 23

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. 151 *et seq.*):
Sec. 6..... 14, 27
Sec. 7..... 27
Sec. 8 (1)..... 27
Sec. 8 (5)..... 14, 15, 27
Sec. 9 (a)..... 16, 20, 27
Sec. 9 (c)..... 14, 28
Sec. 10 (c)..... 14
Sec. 10 (e)..... 28

Miscellaneous:

Constitutionality of Statutes in Relation to Registration Before Voting at Election or Primary, 91 A. L. R. 349, 358..... 22
3 Fletcher, *Cyclopedia of Corporations*, (Perm. ed.), p. 155.. 23
National Labor Relations Board:
First-Tenth Annual Reports..... 17
Third Annual Report..... 19
Field Manual, Sec. 4.3.16..... 19
Rules and Regulations, Series 3, effective November 26, 1943, Article III, Sec. 12..... 29

In the Supreme Court of the United States

OCTOBER TERM 1945

No. 950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the First Circuit entered on December 13, 1945 (R. 111), refusing to enforce an order issued by the Board against A. J. Tower Company and remanding the cause to the Board with directions to make an additional finding of fact.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 101–110) is reported at 152 F. 2d 275. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 9–15) are reported at 60 N. L. R. B. 1414.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on December 13, 1945 (R. 111). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, after a union has received a majority of the votes cast in an election held in accordance with the regulations of the Board to determine the bargaining agent of certain employees, may, without examining into the merits of a post-election challenge to the eligibility of a voter in the election whose ballot may have been essential to the result, properly find that the employer has committed an unfair labor practice by refusing to bargain with the union.

2. Whether a regulation of the Board to the effect that after a petition to investigate and certify under Section 9 (c) of the Act has been filed the parties may, with the approval of the regional director, enter into a consent election agreement, in which event the rulings of the regional director on the conduct of the election and the eligibility of voters shall be final, as applied by the Board to mean that all rulings of the regional director on such matters are final unless arbitrary and capricious, is valid.

3. Whether, if the above regulation is valid, it was arbitrary and capricious for the regional director to rule that the employer was precluded from questioning the employee status of a person who voted in an election conducted by secret ballot where the employer included that person's name on the list of those eligible to vote, had in his possession prior to the election the information on the basis of which he challenged the status, permitted all of the votes to be cast and commingled without challenging any, and waited until the results of the election were announced to raise the question of eligibility.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Rules and Regulations of the National Labor Relations Board are set forth in the Appendix, *infra*, pp. 27–30.

STATEMENT

The Representation Proceeding

On April 24, 1944, Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union, A. F. of L., herein called the Union, filed with the Board (in a proceeding designated by the Board as Case No. 1–R–1880) a petition for investigation and certification of representatives under Section 9 (c) of the Act, seeking exclusive representation of certain employees of respondent (R. 34, 53, 55–

56). On April 27, 1944, an agreement for a "consent" election in accordance with Article III, Section 12, of the Board's Rules and Regulations, Series 3, effective November 26, 1943 (*infra*, pp. 29–30) was entered into between the employer and the Union and approved by the Board's regional director. The agreement provided that an election by secret ballot should be conducted under the supervision of the regional director, to determine whether respondent's employees desired to be represented by the Union (R. 34, 53, 57–59). This agreement provided that the election be held on May 5, 1944, among the employees at respondent's Roxbury plant in the unit defined in the agreement. It provided that (R. 34, 57):

> Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

The agreement also provided that (R. 34, 57–58):

> The eligible voters shall be those employees included within the Unit, who appear on the Employer's pay roll for the period indicated below, including employees

> who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, * * * but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

The pay-roll period for determining eligibility was designated as April 21, 1944.

Pursuant to the terms of the agreement, on May 1, 1944, respondent submitted to the regional director an eligibility list of the employees in the unit involved (R. 34–36, 37, 41, 65). Included on the list, with the notation "Out Sick", was the name of Jennie A. Kane (R. 37, 41), who had last worked for respondent on March 24 (R. 37).

The balloting took place on May 5, 1944 (R. 34, 53), at which time Jennie Kane cast a vote unchallenged by either the Union or the Company observers who were present at the polls and during the counting and tabulation of ballots, and her ballot was therefore commingled with the others (R. 34, 53, 65–66). One of the Company observers was a pay-roll clerk in the factory office (R. 47). A "Certification on Conduct of Election" was signed by the representatives of re-

spondent, the Union, and the Board, certifying that the balloting had been held, that it was fairly conducted, and that all eligible voters were given an opportunity to cast their ballots in secret (R. 34, 60, 66). Following the counting of the ballots, all the parties signed a "Tally of Ballots", which disclosed that out of 230 valid votes counted, 116 had been cast for the Union and 114 against it, and that 1 ballot had been challenged by the Union. The regional director certified that a majority of the ballots had been cast for the Union and that there were not challenges sufficient in number to affect the results of the election. The observers for the Company and the Union certified that the counting and tabulating were fairly done and that the results were as reported by the regional director (R. 34, 53, 61–62, 66).

On May 9, 1944, respondent, through its counsel, wrote the regional director that it had just received information that Jennie Kane was not an employee of the Company at the time of the election and that it was therefore challenging her right to vote in the election and the ballot cast by her. The Company requested that, in view of this challenge, the regional director rule on the ballot previously reported as challenged in the tally and upon Kane's vote (R. 34, 48, 53, 63–64, 66, 70–71). This procedure could have resulted in a tie vote, with the Union falling short of a majority, if the Union's challenge were overruled

and the ballot in question were cast against the Union, and if Kane were declared ineligible to vote and her vote were assumed to have been for the Union.

A conference for the purpose of considering these objections was held on May 12, 1944, and a hearing on the objections was conducted under the auspices of the regional director on May 22, 1944, at which representatives of respondent, the Union, and the Board were present (R. 34, 53). At this hearing, respondent, in support of its contention that Kane was not an employee at the time of the election, introduced a notice sent to it on May 1, 1944, by the Massachusetts Division of Employment Security, of a claim for unemployment benefits filed by Kane on April 28, 1944, in which she had stated that she had left the employ of respondent in March 1944 (R. 39, 72–73). Respondent did not deny that it had received this notice several days prior to the date of the election (R. 43–45), although its plant superintendent stated that the matter had not come to his attention until after the election (R. 39, 40, 44). Respondent stated that it had also learned that on April 28, Mrs. Kane had placed her name on the list of the United States Employment Service as available for work (R. 38). Respondent also submitted a written statement signed by Mrs. Kane on May 8, 1944, stating that she had voted for the Union in the election (R. 34, 64, 86, 98).

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An agent of the Board interviewed Mrs. Kane on May 23, 1944 (R. 34, 64). She told him that she considered herself an employee of the respondent at the time she voted and still considered herself an employee (R. 34, 64). She explained that she had been ill and had applied for unemployment benefits in the belief she was entitled to them while she was ill and that she did not know applying for such benefits would be considered as quitting respondent's employ because she intended to return to work at the Company as soon as she was able (R. 34, 65).

On May 24, 1944, the regional director issued his "Report on Objections,"[1] in which he ruled that "although the question of Mrs. Kane's status as an employee is not quite clear, * * * under the circumstances set forth, the Company has waived its right to challenge her vote or to object to the election on this ground" (R. 34, 66). The circumstances which governed his ruling were set forth as follows: The eligibility list had been prepared solely by respondent and had been submitted by it as the exclusive list of eligible voters. Respondent alone knew the facts as to Kane several days before the election but had made no attempt to correct the eligibility list. Respondent's observers failed to challenge Kane's right to vote when she presented herself at the polls and they signed the usual certification on the

[1] One paragraph was amended on May 31, 1944 (R. 34, 67).

conduct of the election after the voting. Respondent thus acquiesced in Kane's voting until 4 days after the election, when for the first time it came forth with a fact "peculiarly within the Company's knowledge" (*ibid.*). "To hold otherwise would vitiate the Board's procedure of having observers present at the polls, and challenges by such observers, and of certifications of conduct by the parties." This determination made it unnecessary for the regional director to comply with respondent's request that he rule on the ballot previously challenged at the polls, since it could not affect the clear majority of the Union. The regional director thereupon found that the Union had received a majority of the valid votes cast and that it was, therefore, pursuant to the consent election agreement of the parties, the exclusive representative of all the employees in the appropriate unit (R. 34, 53, 66–67).

The Unfair Labor Practice Proceeding

On June 9, 1944, the Union filed with the Board (in a proceeding designated by the Board as Case No. 1–C–2416), a charge alleging that the respondent had refused to bargain collectively with it (R. 16). The Board thereupon issued its complaint against respondent, and respondent answered admitting that it had refused to bargain collectively with the Union but denying that the Union had ever been designated by a majority of the employees in the appropriate unit (R. 33,

50–51). The answer asserted that the results of the consent election of May 5, 1944 could not be relied on as establishing the Union's representative status because Mrs. Kane's vote had been counted improperly (R. 33, 50–57).

After the usual proceedings, the Board on March 23, 1945 issued its findings of fact, conclusions and order (R. 9–15), holding that the regional director's ruling that the respondent could not for the first time challenge the vote of Mrs. Kane after the results of the election had been announced was neither arbitrary nor capricious and therefore would not be disturbed. The Board pointed out that quite apart from the effect of the consent election agreement, the Board itself would have reached the same conclusions as the regional director respecting Mrs. Kane's vote (R. 11). The position of the Board respecting such post-election challenges is stated in its decision as follows (R. 11):

> We have consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result. Moreover, a post-election challenge forecloses identification of the ballot which would otherwise have been segregated. Since the challenged ballot may have been

> cast against the Union, [evidence as to how it was cast being unacceptable,] it would be necessary, in order to sustain such a challenge, to set aside the election even though a majority of the valid votes have been cast for the Union. We do not believe it to be sound administrative practice to overturn an election under these circumstances when such a result flows from the fault of the objecting party.

The Board therefore entered an order requiring respondent to cease and desist from its unfair labor practice and to take the affirmative action of bargaining collectively with the Union (R. 11–12).

Upon the Board's petition for enforcement of its order, the court below construed the statute as making it a jurisdictional prerequisite to any determination that an employer has committed the unfair labor practice of refusing to bargain collectively, that the union with which he has refused to deal should have been chosen by a majority of the employees voting (R. 106). The court therefore concluded that under the facts of the case "the Board had no jurisdiction to find the Company guilty of violating Section 8·(5) in the absence of a finding that Mrs. Kane was an employee on the date stipulated" (R. 107). It accordingly set aside the Board's order and remanded the cause to the Board for further proceedings not inconsistent with its opinion (R. 110).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In construing the National Labor Relations Act as making it a jurisdictional prerequisite to any determination that the respondent committed the unfair labor practice of refusing to bargain collectively, that the Board find that Mrs. Kane was in fact an employee on the date she cast her ballot in the election conducted by the Board's regional director.

2. In holding that although there is no reliable method of determining for whom Mrs. Kane voted, since her ballot was commingled with the other 230 ballots, the court must assume she voted for the Union.

3. In holding that the Board must consider the post-election challenge of Mrs. Kane's eligibility to vote in the election.

4. In holding that the Board could not give effect to the consent election agreement entered into between the Union and the respondent insofar as it made the rulings of the regional director on all questions as to the conduct of the election final and binding.

5. In holding that the Board could not treat the regional director's ruling that respondent, by failing to challenge Mrs. Kane's right to vote prior to the time her ballot was commingled, had waived its right to question her eligibility, as final and binding.

6. In holding that the Board was required to go behind the finding of the regional director, made under the terms of a consent election agreement entered into between the Union and the respondent, that the Union is the exclusive representative for purposes of collective bargaining of the employees in the unit specified in the consent election agreement.

7. In holding that the Board must determine whether Mrs. Kane was an employee of the respondent on the eligibility date and on the date she voted.

8. In setting aside the Board's finding that the Union was the exclusive representative for purposes of collective bargaining of the respondent's employees in an appropriate unit.

9. In setting aside the Board's finding that the respondent had committed an unfair labor practice by refusing to bargain collectively with the Union.

10. In setting aside and refusing to enforce the Board's order.

REASONS FOR GRANTING THE WRIT

I

The holding of the court below substantially impairs the ability of the Board to administer the National Labor Relations Act in situations which require elections to determine collective bargaining representatives. Such elections can be successfully conducted and the duty of employers to

bargain with employee representatives chosen in elections can be enforced only if finality may be given to the election results reached. The court below did not pass upon the validity of the Board's regulations or the consent agreement under which the election here was held, but decided that the end-purpose of the entire process of designating employee representatives—namely, collective bargaining between the employer and those representatives—can be compelled only if the Board undertakes an examination into the merits of post-election challenges by the employer to the eligibility of employees voting in the election whose vote may have been necessary to the result, and makes findings with regard to their eligibility. Such a procedure would involve reopening matters supposedly settled in the election proceedings.

Nothing in the Act compels this result. On the contrary, the Board's authority under Section 9 (c) to conduct an election to determine bargaining representatives, coupled with its power under Section 6 to prescribe regulations to carry out the provisions of the Act, gives validity to election results reached under its regulations; and a cease-and-desist order under Section 10 (c), occasioned by an employer's refusal to bargain collectively with the representatives of his employees in violation of Section 8 (5), may, we submit, give effect to those results, provided the Board's regulations are not arbitrary. The contrary conclusion of the court below imposes hampering

prerequisites upon the enforcement of an important category of Board orders and casts doubt upon the validity of the Board's usual election procedures, which are employed in thousands of cases annually and which we believe to be reasonable and valid. It conflicts, moreover, with the decision of the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Capitol Greyhound Lines,* 140 F. 2d 754, certiorari denied, 322 U. S. 763, which enforced a Board order in the face of a similar attack. We believe, therefore, that the instant decision should be reviewed by this Court.

As has been stated (*supra,* p. 11) the court below placed its decision upon the ground that the National Labor Relations Board lacks jurisdiction to compel collective bargaining with a given union unless that union is found by the Board to have been chosen by a majority of the actual employees in the unit involved. The court in the *Capitol Greyhound* case, *supra,* held, on the other hand, that "if the Union was chosen as collective bargaining agent in conformity with due process under the National Labor Relations Act, the order of the Board [to compel the employer to cease and desist from refusing to bargain with the union] should unquestionably be enforced". (140 F. 2d at 755.) We submit that the latter view is the correct one. The language of Section 8 (5) of the Act, making it an unfair labor practice "to refuse to bargain collectively with the representatives of

* * * employees, subject to the provisions of Section 9 (a)", coupled with the provision of Section 9 (a) that "representatives designated or selected for the purposes of collective bargaining by the majority of the employees * * * shall be the exclusive representatives * * * for the purposes of collective bargaining", means representatives designated or selected according to procedures validly prescribed pursuant to the Act. These procedures must necessarily include provision for determining the eligibility of voters in elections and of giving finality to the results of elections which have been conducted under the procedures prescribed. If this is not so, the Board must hold itself in readiness to determine the merits of all challenges to the eligibility of voters, either before the election results are certified or afterward, at least in cases where the challenged ballots may determine the outcome of the elections. Such a procedure would be thoroughly impractical and, we submit, was not intended to be required by the Act.

While the court below expressly disclaimed any intention to pass on the validity of the procedures and the consent agreement under which the election in the present case was conducted or of the Board's interpretation of the agreement (R. 108), the necessary effect of its decision is to invalidate part of the Board's established machinery for conducting elections. The Board, on the other hand, held (1) that the regional director's refusal

in this case to allow the challenge was neither arbitrary nor capricious and accordingly was binding on the parties to the consent election agreement and (2) that the Board may properly bar post-election challenges in similar circumstances even though the parties have not entered into a consent election agreement. We think that both grounds of the Board's decision are valid.

The Board's consent election procedures have provided from the beginning, as did the agreement in this case, that the determination of the regional director shall be final and binding as to any question relating to the election, including questions as to the eligiblity of voters, raised by any party to the election. The Board has conducted approximately 16,436 consent elections under this procedure, 1513 of which have occurred during the forepart of the current fiscal year.[2]

[2] The following table shows the number of consent elections conducted by the Board, together with the report of the Board in which this information is made public:

	Number of consent elections
First Annual Report, p. 44	23
Second Annual Report, p. 29	217
Third Annual Report, p. 47	812
Fourth Annual Report, p. 51	481
Fifth Annual Report, p. 18	676
Sixth Annual Report, p. 36	1,732
Seventh Annual Report, p. 32-34	*3,050
Eighth Annual Report, p. 24	*2,755
Ninth Annual Report, p. 20	2,434
Tenth Annual Report	2,543
Current fiscal year	1,513
Total consent elections	16,436

*These figures include a number of payroll checks and stipulated elections.

Post-election challenges in Board-directed elections have been handled under what is in effect the same rule as governs consent elections, although in the one case the Board itself refuses to inquire into the merits of the post-election challenges on the ground that the failure to object prior to the announcement of the results is a bar to the challenge, and in the other case reaches the same result by giving effect to the finality of the regional director's ruling that he will not inquire into such challenge.[3] Invalidation of this method of handling post-election challenges would require a change in the Board's whole method of conducting elections. It is of major importance in the administration of the Act that this method be not overthrown by a mechanical application

[3] Post-election challenges based on ineligibility arose in the following Board-directed elections: *Matter of Cudahy Packing Co.*, 4 N. L. R. B. 39, 41; *Matter of Mahon Co.*, 9 N. L. R. B. 430, 431; *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739, 740; *Matter of Denver Publishing Co.*, 61 N. L. R. B. 338, 339; *Matter of Owens-Corning Fiberglas Co.*, 61 N. L. R. B. 546; *Matter of Harry Manaster & Bro.*, 61 N. L. R. B. 1373, 1374; *Matter of Chrysler Corp.*, 63 N. L. R. B. No. 132; *Matter of Norris, Inc.*, 63 N. L. R. B. No. 78. Post-election challenges based on ineligibility arose in the following consent elections; *Matter of Kellogg Switchboard and Supply Co.*, 28 N. L. R. B. 847, 852; *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156. Post-election objections based on grounds other than ineligibility arose in the following Board-directed elections: *Matter of International Freighting Co.*, 6 N. L. R. B. 271, 272; *Matter of Solvay Process Co.*, 37 N. L. R. B. 983, 984; *Matter of Kilburn Mills*, 48 N. L. R. B. 1251; *Matter of Lane Cotton Mills Co.*, 9 N. L. R. B. 952, 956, enforced 111 F. 2d 814 (C. C. A. 5).

of Sections 8 (5) and 9 (a), which has regard neither to the general scheme of the Act nor to the practical requirements of administration.

The machinery which the Board has designed to enable it expeditiously to poll the large numbers of employees involved in the elections it holds, while containing safeguards designed to assure that no one will vote who is not eligible, operates on the premise that the Board will not actually determine the eligibility of any person to vote unless a challenge is made prior to the time his vote is cast and commingled. The lists of proposed voters are prepared a reasonable period before the election and are made available to all parties. All parties are permitted to have representatives present at the polls to challenge any voter.[4] Hence the vast bulk of those who vote are persons whose status either as employees or as workers within the appropriate unit[5] has

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[4] Although the Board at one time followed the practice of refusing to permit employer representatives to be present at the polls if any union objected (see *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 32, 33, 37; National Labor Relations Board, Third Annual Report, p. 147), for the past three years it has permitted the employer in all cases to have observers selected from among the nonsupervisory employees. See the election agreement in this case (R. 58), which is the standard form used by the Board, and the Board's *Field Manual*, Sec. 4.3.16.

[5] The principle enunciated by the court below would require the Board to determine the membership of an employee in the appropriate unit, equally with his employee status, if a post-election challenge as to such membership

never been the subject of any finding by the Board. If, as the court below holds, such a finding is a jurisdictional prerequisite to the validity of the Board's certification of a union, and cannot be waived or rendered unnecessary by failure to raise the issue in timely fashion, the Board will be required to alter its election machinery materially.

Nor does the asserted defect lend itself to easy correction. If the time of the commingling of the ballots cannot be said to be a proper point before which a challenge to the eligibility of a voter must be made, no subsequent point of time can be set with greater validity. The decision below is based upon a principle which would permit the issue of eligibility to be raised at any time, even in a complaint proceeding following the election. The Board's certification of a union would thus be final as against possible challenges to the majority only if the Board had entered into the laborious task of making inquiry and findings with respect to the status of every voter. The time and expense which would be consumed by such a change of procedure would mean an end of employee elections on the scale on which the Board has handled them in the past.

Any requirement that the Board actually determine the eligibility of those who have voted in

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were made; for Section 9 (a) of the Act renders the representatives of a majority of the "employees in a unit" the exclusive representatives for bargaining purposes.

an election opens the door wide to contests over the status of voters. In close elections it would be to the advantage of the losing union or the employer to raise issues and require proof as to the status of innumerable voters in the hope that doubt would be cast upon enough votes to require a new election.[6] Under the policy followed by the Board, numerous persons are eligible to vote even though they do not work on the day of the election, as for example employees temporarily laid off, or ill, or on vacation, or in the armed forces. The various attacks that could be made on the eligibility of such persons are apparent. Furthermore, if post-election challenges are permitted, the employer will be given a strong inducement to include on the pay-roll submitted the names of

[6] The court below held (R. 108) that the case must be determined upon the assumption that the challenged ballot was cast in favor of the Union. Under the court's reasoning, the Board would in all cases be compelled to assume that the vote was cast with the majority or else to inquire into the way it was actually cast. Neither alternative is acceptable, the former because it is unrealistic and the latter because it would involve an objectionable inquiry into voting which can properly be conducted only under the safeguards of secrecy. As the Board pointed out in its opinion in the instant case (R. 11), the employer's "invasion of the voter's privacy" by inquiring into the nature of his vote would "nullify the very purpose of the secret ballot" and should be regarded as an unfair labor practice. A similar inquiry by agents of the Board would be only slightly less objectionable. There is no feasible alternative, therefore, to invalidating an election if the number of voters found to have been ineligible equals or exceeds the majority by which the election was determined.

persons whose status as employees is dubious or non-existent in the hope that he can thereby invalidate the election. Thus, the dangers of allowing post-election challenges by employers to the employee status of persons included on the payroll are much greater than those which attach to post-election challenges in other types of elections, because of the peculiar relationship the employer bears to the preparation of the eligibility list.

The reasonableness of the Board's rule barring post-election challenges is supported by numerous cases involving political and corporate elections. While procedures vary, the device of a registration list which may not be corrected after a ballot has been commingled is generally held to be a reasonable means of insuring fair elections. See cases collected in *Constitutionality of Statutes in Relation to Registration before Voting at Election or Primary,* 91 A. L. R. 349, 358. Illustrative is *Moore* v. *Bay,* 149 Md. 286, 131 At. 459, in which the plaintiffs were not allowed to show that 170 of the persons who voted in a municipal election decided by a majority of less than 100 votes, although registered, were disqualified because they had not paid the required taxes. The court in its opinion called attention to the machinery for purging the registration rolls before the ballots were cast and commingled and ruled that failure to utilize this machinery barred the post-election

challenge. See also *Duplessis* v. *Harrell*, 9 La. App. 171, 119 So. 264; *Cambre* v. *Brignac*, 19 La. App. 437, 140 So. 702; *Turregano* v. *Whittington*, 132 La. 454, 61 So. 525; *Perez* v. *Cognevich*, 156 La. 331, 100 So. 444; *Bradley* v. *Neill*, 174 La. 702, 141 So. 382; *Hyde* v. *Brush*, 34 Conn. 454; *Re Port Arthur Provincial Election*, 14 Ont. L. 345; *Re McGrath*, 17 Ont. L. 514; *Re Schumacher*, 21 Ont. L. 522; *In re Chenango County Mutual Ins. Co.*, 19 Wend. (N. Y.) 635; *Rossing* v. *State Bank*, 181 Ia. 1013, 165 N. W. 254; 3 Fletcher, *Cyclopedia of Corporations* (Perm. ed.), p. 155.

II

Where, as here, the agreement under which an election is conducted gives finality to the decision of a designated individual with respect to any question affecting the election, an additional reason supports the validity of the procedure and of his decision that a post-election challenge may not be entertained. The rule is well settled that the parties to a contract may agree in advance to submit broad categories of questions to a designated person and that his decision, once arrived at, is final and binding unless fraudulent or arbitrary and capricious. *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *Plumley* v. *United States*, 226 U. S. 545; *Martinsburg & Potomac R. Co.* v. *March*, 114 U. S 549; *Memphis*

Trust Co. v. *Brown-Ketchum Iron Works,* 166 Fed. 398, 403–404 (C. C. A. 6), certiorari denied, 214 U. S. 515. We think the Board's regulations may validly provide for an agreement which leaves procedural as well as fact questions relating to the election to the regional director; and such an agreement, once made, is binding in all respects. In this case the issues raised by the employer's challenge were submitted to the regional director and determined by him. Under any view, therefore, his decision should be given effect unless arbitrary or capricious.

The reasoning which supports the validity of the rule excluding post-election challenges to the eligibility of voters also sustains the regional director's determination in this case. The decision of the court below cannot be supported on the ground that the director was arbitrary in deciding under the circumstances that the election should not be invalidated by the employer's challenge; for the challenge came too late because of the employer's own neglect.

III

The conflict between the instant case and that of the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Capitol Greyhound Lines,* 140 F. 2d 754, certiorari denied, 322 U. S. 763, is, we believe, direct. Not only do

the two cases enunciate conflicting principles (see *supra*, p. 15), but the facts presented by the *Capitol Greyhound* case were identical with the facts of the instant case except that the employee, Nolan, whose vote, if cast for the union, was determinative of the election in that case had been hired for the first time subsequent to the eligibility date. The employer had apparently inadvertently supplied the regional director with the payroll for a period subsequent to that date. The Board held that the regional director's ruling barring the employer's post-election challenge was correct and neither arbitrary nor capricious, although Nolan was not in fact eligible to vote (49 N. L. R. B. 156, 158–159). The Circuit Court of Appeals enforced the Board's order, quoting with approval the paragraphs of the Board's decision in which the Board explained why it regarded the regional director's ruling as neither arbitrary nor capricious (140 F. 2d at 758) and pointing out that the Board's action was entirely within the broad discretion committed to it by Congress in the matter of determining employee bargaining agents (140 F. 2d at 759).

The court below in its opinion asserts a distinction between the facts of the *Capitol Greyhound* case and those in this case on the ground that there the ineligible voter was an employee at the time of the election, whereas here Mrs.

Kane was not (R. 107–108). It seems clear, however, that once the eligibility rules for an election are fixed, the number of days by which the voter misses the qualifying pay-roll period and the time relation of those days to the eligibility date, are immaterial. A voter is either eligible or ineligible. Just as Nolan would have been eligible if the Board had chosen a later date to determine eligibility, so would Mrs. Kane have been eligible if the Board had held this election a month earlier.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

DAVID A. MORSE,
General Counsel,
National Labor Relations Board.

MARCH 1946.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect

to rates of pay, wages, hours of employment, or other conditions of employment; *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10.

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(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court

a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleading, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

The pertinent provisions of the Rules and Regulations of the National Labor Relations Board (Series 3, effective November 26, 1943) are as follows:

ARTICLE III

SEC. 12.

Hearing waived by stipulation; consent election agreements; consent cross-check agreements. * * *

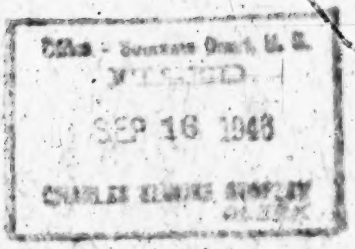
After a petition has been filed and it appears to the Regional Director that an investigation should be instituted, the parties and any known individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter

into a consent election agreement or consent cross-check agreement leading to a statement by the Regional Director of the facts ascertained after such consent election or cross check but not resulting in a certification by the Board under Section 9 (c) of the Act. Such agreement shall include a determination of the appropriate unit, the time and place of holding the election, and the pay roll to be used in determining what employees within the appropriate unit shall be eligible to vote or to be counted. Such consent election or consent cross check shall be conducted under the direction and supervision of the Regional Director.

The method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections directed by the Board, pursuant to Section 9, Article III, of these Rules and Regulations, except that the rulings of the Regional Director shall be final, and the statement by the Regional Director of the results thereof shall be final. The method of conducting such consent cross check shall be set forth in the consent cross-check agreement. The rulings of the Regional Director on all matters shall be final, and the statement by the Regional Director of the results thereof shall be final.

U. S. GOVERNMENT PRINTING OFFICE: 1946

FILE COPY



No. 60

In the Supreme Court of the United States

OCTOBER TERM, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	3
Statement:	
I. The representation proceeding	3
II. The unfair labor practice proceeding	17
Specification of errors to be urged	20
Summary of argument	22
Argument	25
I. The Board, by standards applicable in Board-directed elections, properly refused to entertain the post-election challenge to Mrs. Kane's eligibility	27
A. The election procedures established by the Board afford reasonable assurance that only eligible persons will vote	31
B. The Board's refusal to entertain post-election challenges is a reasonable measure to assure secrecy of the ballot and finality of the election	40
II. The Board properly held that since respondent had signed a consent election agreement, it was bound by the regional director's rulings which were neither arbitrary nor capricious	54
A. Article III, Section 12, of the Board's Rules and Regulations, which provides that, in a consent election, the rulings of the regional director on the conduct of the election and the eligibility of voters shall be final, is valid as applied by the Board to mean that all rulings of the regional director on such matters are final unless arbitrary and capricious	54
B. The regional director's ruling was neither arbitrary nor capricious	60
Conclusion	73
Appendix	75

712662—46——1

CITATIONS

Cases:

	Page
Aetna Firebrick Co., Matter of, 56 N. L. R.B. 849	26, 57
American Granite Finishing Co., Matter of, 28 N. L. R. B. 739	41, 70
American Steel Scraper Co., Matter of, 21 N. L. R. B. 218	34
Beggs & Cobb, Inc., Matter of, 62 N. L. R. B. 193	41
Bradley v. *Neill*, 174 La. 702, 141 So. 382	49
Cambre v. *Brignac*, 19 La. App. 437, 140 So. 702	49
Capitol Greyhound Lines, Matter of, 49 N. L. R. B. 156, enforced, 140 F. 2d 754, certiorari denied, 322 U. S. 763	26, 42, 50, 51, 57, 58, 59, 63, 70
Chenango County Mutual Ins. Co., In re, 19 Wend. (N. Y.) 635	50
Chrysler Corp., Matter of, 63 N. L. R. B. 866	39, 42, 47
Cudahy Packing Co., Matter of, 26 N. L. R. B. 749, 27 N. L. R. B. 108, 4 N. L. R. B. 39	37, 72
Cushman Shoe Co., Matter of, 2 N. L. R. B. 1015	37
Davis v. *Town of Saluda*, 147 S. C. 498, 145 S. E. 412	49
Denver Publishing Co., Matter of, 61 N. L. R. B. 338	41
Duplessis v. *Harrell*, 9 La. App. 171, 119 So. 264	49
Elliott Bay Lumber Co., Matter of, 9 N. L. R. B. 3	32
Hale, Wayne, Matter of, 62 N. L. R. B. 1393	41
Hand & Johnson Tug Line v. *Canada S. S. Lines, Ltd.*, 281 Fed. 779	63
Hartbridge, The, 62 F. 2d 72, certiorari denied, 288 U. S. 601	59, 65
Hofman, O. U., Matter of, 55 N. L. R. B. 683, enforced, 147 F. 2d 679	57
Holgate Brothers Company, Matter of, 31 N. L. R. B. 485	33
Home Mfg. Co., Matter of, 26 N. L. R. B. 916	34
"Hunt" for Chevrolets, Matter of, Decision No. 3593, Case No. WE-421, July 8, 1946, 18 L. R. R. M. 1229	38
Hyde v. *Brush*, 34 Conn. 454	49
Kellogg Switchboard and Supply Co., Matter of, 28 N. L. R. B. 847	42, 57, 70
Kihlberg v. *United States*, 97 U. S. 398	59, 65
Kilburn Mills, Matter of, 48 N. L. R. B. 1252	72
KMOX Broadcasting Station, Matter of, 10 N. L. R. B. 479	34
Lamar Cotton Oil Co., Matter of, 67 N. L. R. B. No. 188	72
Manaster, Harry, & Bro., Matter of, 61 N. L. R. B. 1373	42
Marine Transit Corp. v. *Dreyfus*, 284 U. S. 263	59
Marlin-Rockwell Corp. v. *National Labor Relations Board*, 116 F. 2d 586, certiorari denied, 313 U. S. 594	28
Martinsburg & Potomac R. Co. v. *March*, 114 U. S. 549	59
May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376	27
McGrath, Re, 17 Ont. L. 514	49
Memphis Trust Co. v. *Brown-Ketchum Iron Works*, 166 Fed. 398, certiorari denied, 214 U. S. 515	59

Cases—Continued

	Page
Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387	59
Metro-Goldwyn-Mayer Studios, Matter of, 8 N. L. R. B. 858	37
Minton v. *F. G. Smith Piano Co.*, 36 App. D. C. 137	59
Mobile Steamship Ass'n, Matter of, 8 N. L. R. B. 1297	34
Monon Stone Company, Matter of, 10 N. L. R. B. 64	34
Moore v. *Bay*, 149 Md. 286, 131 Atl. 459	49
Morrill v. *Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547	50
Moulton Ladder Mfg. Co., Matter of, 27 N. L. R. B. 40	72
National Labor Relations Board v. *Central Dispensary and Emergency Hospital*, 145 F. 2d 852, certiorari denied, 324 U. S. 847	28
National Labor Relations Board v. *National Mineral Co.*, 134 F. 2d 424, certiorari denied, 320 U. S. 753	37
National Labor Relations Board v. *The Standard Lime and Stone Co.*, 149 F. 2d 435, certiorari denied, 326 U. S. 723	28
National Labor Relations Board v. *Whittier Mills Co.*, 111 F. 2d 474	28
National Mineral Co., Matter of, 27 N. L. R. B. 432	37
New York Handkerchief Mfg. Co. v. *National Labor Relations Board*, 114 F. 2d 144, certiorari denied, 311 U. S. 704	28
Norris, Inc., Matter of, 63 N. L. R. B. 502	39, 42, 70
Owens-Corning Fiberglas Corp., Matter of, 61 N. L. R. B. 546	41, 70
Palmer v. *New York Herald Co.*, 228 App. Div. 176, 239 N. Y. S. 619	63
Patent Button Co., Matter of, 65 N. L. R. B. No. 51	72
Pellon v. *Conn. Gen. Life Ins. Co.*, 105 Vt. 508, 168 Atl. 701	63
Pendleton v. *Pace*, 9 S. W. 2d 437	59
People v. *Robinson*, 64 Calif. 373, 1 Pac. 156	50
Perez v. *Cognevich*, 156 La. 331, 100 So. 444	49
Plumley v. *United States*, 226 U. S. 545	59
Port Arthur Provincial Election, Re, 14 Ont. L. 345	49
Post Printing and Publishing Co., The, Matter of, 59 N. L. R. B. 1115	35
Price, John, Sr., Matter of, 67 N. L. R. B. No. 146	42
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U. S. 793	29
Richardson & Sons v. *Hedger Transportation Corp.*, 98 F. 2d 55	59, 65
Rock River Woolen Mills, Matter of, 18 N. L. R. B. 828	34
Rossing v. *State Bank*, 181 Ia. 1013, 165 N. W. 254	50
Schumacher, Re, 21 Ont. L. 522	49
Solvay Process Co., Matter of, 37 N. L. R. B. 983	72
Southern S. S. Co. v. *National Labor Relations Board*, 316 U. S. 31	38
Standard Oil Co., Matter of, 23 N. L. R. B. 860	34

Cases—Continued	Page
Turregano v. *Whittington*, 132 La. 454, 61 So. 525	49
Twombley v. *Framingham Gas, Fuel & Power Co.*, 248 Mass. 53, 143 N. E. 828	63
United States v. *Cooke*, 207 Fed. 682	59, 65
United States v. *Gleason*, 175 U. S. 588	59
United States v. *Mason & Hanger Co.*, 260 U. S. 323	59
Virginia Bridge Co., Matter of, 29 N. L. R. B. 241	33
Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515	28
Wadham's Division of Socony Vacuum Oil Co., Matter of, 54 N. L. R. B. 1164	35
Walton Lumber Co., Matter of, 20 N. L. R. B. 573	34
Wilkins v. *Allen*, 169 N. Y. 494, 62 N. E. 575	59, 65
Worcester Woolen Mills Corp., Matter of, 69 N. L. R. B. No. 51	39, 42
Federal statutes:	
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):	
Section 6	54, 75
Section 7	75
Section 8	75
Section 9 (a)	27, 28, 52, 75
Section 9 (c)	27, 76
Section 9 (d)	76
Section 10 (e)	77
Railway Labor Act, Section 2, Fourth, c. 347, 44 Stat. 577, c. 691, 48 Stat. 1186, 45 U. S. C. 152, Fourth	27
State statutes:	
Alabama Code 1940, Title 17, Sections 187–190	70
California Civil Code (Deering's), Section 320a	50
California Elections Code (Deering's), Sections 5620–5631	70
Colorado Stat. Ann. 1935, c. 59, Section 228	70
Connecticut Rev. Stat. 1930, Section 602	49, 70
Delaware Rev. Code 1935, Sections 1862, 2023, 2061	49, 50
Florida Stat. Ann., Section 102.42	70
Georgia Code Ann., Section 34–805	70
Idaho Code Ann. 1932, Sections 33–916, 33–924	70
Kentucky Rev. Stat. 1944, Sections 118.240, 118.260	71
Louisiana Gen. Stats. (Dart's), 1939 Ann., Section 2741	71
Maine Rev. Stat. 1944, c. 5, Section 38	71
Maryland Ann. Code 1939, Article 33, Sections 57, 106	71
Michigan Compiled Laws 1929, Sections 3122, 3124	49, 71
Minnesota Statutes (Mason's) 1927, Section 425	71
Mississippi Code Amer. 1942, Section 3129	71
Montana Rev. Code 1935 Ann., Sections 573, 5971.1	50, 71

State statutes—Continued
Page
Nevada Comp. Laws 1929, Section 2449 71
New Hampshire Rev. Laws 1942, c. 41, Section 16 71
New Jersey Rev. Stat. 1937, Sections 14:10-5, 14:10-6, 19:15-18, 19:15-34 ..... 49, 50, 71
New Mexico Stat. 1941 Ann., Section 56-314 71
New York-McKinneys Consol. Laws Ann., Elections, Sections 361-364 71
New York-McKinneys Consol. Laws, Stock Corporation Law, Section 47 50
North Carolina Gen. Stat. 1943, Section 55-107 50
North Dakota Rev. Code 1943, Section 16-1214 71
Ohio Code Ann. (Throckmorton's) 1940, Sections 4785-82, 4785-129, 8673-3 ..... 50, 71
Oklahoma Stat. 1941, Title 26, Sections 63, 256 71
Oregon Comp. Laws Ann., Sections 81-111, 81-1605 71
Pennsylvania Stat. Ann. (Purdon's), Title 25, Sections 623-38, 807-137, 809-37, 3050 ..... 49, 71
South Dakota Code 1939, Sections 16.0225, 16.1207 71
Tennessee Code Ann. (Williams') 1934, Section 2078 71
Texas Civil Stats. Ann. (Vernon's), Art. 3006 71
Utah Code Ann. 1943, Sections 18-2-39, 25-3-35, 25-6-18 ..... 50, 71
Vermont Public Laws 1933, Section 118 49
Washington Revised Stat. Ann. (Remington's), Section 5325 71
West Virginia Code 1943, Sections 80, 118 ..... 49, 71
Wisconsin Stat. 1945, Sections, 6.50, 6.52 71
Miscellaneous:
Annual Reports, National Labor Relations Board:
First Annual Report, p. 44 55
Second Annual Report, p. 29 55
Third Annual Report, pp. 47, 147 ..... 38, 55
Fourth Annual Report, p. 51 55
Fifth Annual Report, p. 18 55
Sixth Annual Report, p. 36 55
Seventh Annual Report, pp. 32, 33, 34 ..... 53, 55
Eighth Annual Report, p. 24 55
Ninth Annual Report, pp. 16, 20 55
Tenth Annual Report, pp. 8, 10 ..... 53, 54, 55
Ballantine, *Corporations* (1927), Section 170, p. 569 50
Constitutionality of Statutes in Relation to Registration Before Voting at Election or Primary, 91 A. L. R. 349 31
Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1414 44
5 Fletcher, *Cyclopedia of Corporations* (perm. ed.), Sections 2017, 2028, 2044, pp. 83, 155 50
H. Rep. No. 1147, 74th Cong., 1st sess., pp. 21, 22 ..... 28, 44

Annual Reports, National Labor Relations Board—Con.. Page

Rules and Regulations of the National Labor Relations Board (Series 3, effective November 26, 1943):

Article III:

Section 1 78
Section 3 78
Section 6 78
Section 8 78
Section 9 79
Section 10 ..... 40, 69, 79
Section 12 ..... 4, 26, 54, 81

S. Rep. No. 573, 74th Cong., 1st sess., p. 13 28

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 118–123) is reported at 152 F. 2d 275. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 10–16) are reported at 60 N. L. R. B. 1414.

JURISDICTION

The decree of the court below was entered on December 13, 1945 (R. 124). The petition for a writ of certiorari was filed on March 13, 1946, and granted on May 6, 1946 (R. 124). The juris-

diction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and on Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, after a union has received a majority of the votes cast in an election held in accordance with the regulations of the Board to determine the bargaining agent of certain employees, may, without examining into the merits of a post-election challenge to the eligibility of a voter in the election whose ballot may have been essential to the result, properly find that the employer has committed an unfair labor practice by refusing to bargain with the union.

2. Whether a regulation of the Board to the effect that after a petition to investigate and certify under Section 9 (c) of the Act has been filed, the parties may, with the approval of the regional director, enter into a consent election agreement, in which event the rulings of the regional director on the conduct of the election and the eligibility of voters shall be final, as applied by the Board to mean that all rulings of the regional director on such matters are final unless arbitrary and capricious, is valid.

3. Whether, if the above regulation is valid, it was arbitrary and capricious for the regional director to rule that the employer was precluded

from questioning the employee status of a person who voted in an election conducted by secret ballot where the employer included that person's name on the list of those eligible to vote, had in his possession prior to the election the information on the basis of which he later attempted to challenge the status, permitted all of the votes to be cast and commingled without challenging any, and waited until the results of the election were announced to raise the question of eligibility.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Rules and Regulations of the National Labor Relations Board are set forth in the Appendix, *infra*, pp. 75–82.

STATEMENT

I

THE REPRESENTATION PROCEEDING

On April 24, 1944, Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union, A. F. of L., herein called the Union, filed with the Board (in a proceeding designated by the Board as Case No. 1–R–1880) a petition for investigation and certification of representatives under Section 9 (c) of the Act, seeking exclusive representation of certain employees of the respondent (R. 37, 102–103). On April 27, 1944, an agree-

712662—46—2

ment for a "consent" election in accordance with Article III, Section 12, of the Board's Rules and Regulations, Series 3, effective November 26, 1943 (*infra*, pp. 81–82), was entered into between the respondent and the Union and approved by the Board's regional director (R. 37, 104–106). The agreement provided that an election by secret ballot should be conducted on May 5, 1944, under the supervision of the regional director, to determine whether the employees at respondent's Roxbury plant in the unit defined in the agreement desired to be represented by the Union (R. 37, 104). The agreement specified that (R. 37, 104):

> Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

The qualifications for participation in the election were stated in the agreement as follows (R. 37, 104–105):

> The eligible voters shall be those employees included within the Unit, who appear on the Employer's pay roll for the period indicated below, including employees

> who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director, an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

The pay-roll period for determining eligibility was designated as April 21, 1944 (R. 37, 105).

Challenges to the eligibility of voters were specifically provided for (R. 37, 105):

> Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

With respect to the procedure to be followed in the event of such challenges, the agreement provided (R. 37, 105);

> If challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon.

The agreement also sets forth the procedure to be followed in the event any party sought to question the regularity of the voting or the count of the ballots, by providing that (R. 37, 105);

> Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him.

If the election resulted in the choice of a bargaining agent, the agreement directed that the regional director should "issue a Consent Determination of Representatives to the parties, setting forth the name of the labor organization which has been designated and selected as the exclusive representative of all the employees in the Unit for the purposes of collective bargaining" (R. 37, 105–106).

Pursuant to the terms of the agreement, on May 1, 1944, the respondent submitted to the regional director a list of those employees whom

it considered eligible to vote in the election (R. 37, 48, 65, 109–111). The balloting took place on May 5, 1944 (R. 35–37, 101, 107). Respondent and the Union each had observers present throughout the casting of the ballots and their counting and tabulation (R. 35–36, 72, 101). At the close of the voting, a "Certification of Conduct of Election" was signed by the representatives of the respondent, the Union, and the Board; it contained the statement that the "undersigned acted as agents of the Regional Director and as authorized observers, respectively, in the conduct of the balloting" and that they "certify that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote" (R. 37, 106–107, 111). Following the counting of the ballots, all the parties signed a "Tally of Ballots," in which the regional director certified that the results of the tabulation of the ballots cast in the election were 230 valid votes counted, 116 votes cast for the Union, 114 votes cast against it, and one challenged ballot (R. 35–37, 101, 107–108). At the bottom of the tally, the observers for the respondent and the Union stated that they had acted as authorized observers in the counting and tabulating of the ballots and certified "that the counting and tabulating were fairly and accurately done, that the

secrecy of the ballots was maintained, and that the results were as indicated above" (R. 37, 108).

On May 9, 1944, the respondent, through its counsel, wrote the regional director stating that "subsequent to the election * * * it came to the attention of the management of the Company that Mrs. Jennie A. Kane, one of the persons who voted at the election, was not at the time an employee of the Company" (R. 80, 114). The letter proceeded to explain that Mrs. Kane was employed by the respondent from March 16, 1943, through March 24, 1944, but that after the latter date she "did not ever again report for work at the Tower Company and did not appear at the plant of the Tower Company until she appeared for the purpose of voting on May 5, 1944" (R. 80, 114). The letter admitted that the respondent, "not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill, and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote" (R. 80, 114). As the basis of the respondent's belief that Mrs. Kane was no longer an employee, the letter recited that "it has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that

claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she 'could not continue to do heavy work of carrying bundles which was part of her job'. The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment" (R. 80, 114).

In the letter, the respondent further stated that "in the light of the above facts the Company hereby challenges the right of Mrs. Kane to vote in the election of employees at its plant and challenges the ballot cast by her" (R. 80, 114). The letter pointed out that "in the election * * * there was one ballot challenged by the Union which challenge was not passed on because it had appeared that the Union had won the election by two votes. In view of the fact that it would now appear that one person, not an employee of the Tower Company, had voted in this election, this ballot challenged by the Union may materially affect the final election result" (R. 80, 114–115). The letter concluded with the following request (R. 80, 115):

> Accordingly, on behalf of the Company, I hereby request that a hearing be held for the purpose of passing upon this challenged ballot. If the challenge is not sustained and the ballot, upon being opened for the purpose of counting, proves to be

a vote against the Union, it will become material to rule upon the challenge which the Company hereby makes to the vote of Mrs. Kane and the Company requests that a hearing upon such challenge be held.

A conference for the purpose of considering the matters raised by this letter was held on May 12, 1944, and a hearing thereon was conducted under the auspices of the regional director on May 22, 1944, at which representatives of the respondent, the Union and the Board were present (R. 35, 101–102).[1] On May 24, 1944, the regional director issued his "Report on Objections" in which he found that the list of eligible voters used in the election was prepared solely by respondent (R. 37, 111); that the list was submitted on May 1, 1944, by the respondent as "a complete list of employees of the A. J. Tower Co. on the pay roll of April 21, 1944, who were in the unit designated in the consent agreement for an election to be held May 5, 1944" (R. 37, 110); that respondent included Mrs. Kane's name on this list as it assumed she was ill since she had never advised the respondent of any intention on her part to leave its employ (R. 37, 109); that respondent made no attempt,

[1] As is customary under consent election procedures, the hearing was informal in character and no record was made of what transpired. No party has raised any question as to the entire propriety of its conduct. Indeed, counsel for the respondent, during the hearing on the subsequent un-

between May 1 and May 5, 1944, to remove Mrs. Kane's name from the list,[18] although four or five days before the election respondent received by mail a notice of Mrs. Kane's claim for unemployment compensation which the respondent later urged as the basis for determining that Mrs. Kane was not an employee when she voted (R. 37,

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fair labor practice charge, expressly conceded that the hearing held by the regional director was fair and impartial, that the respondent was afforded full opportunity to present all the evidence it desired and that it was in no way attacking the procedure followed (R. 51, 78). At the formal hearing on the unfair labor practice charge, of which a complete record was made, respondent was permitted to introduce all of the evidence bearing on the matters raised in its letter of May 9, 1944, see *supra*, pp. 8–10, (R. 38–83, 100–102, 116–117), not for the purpose of trying *de novo* the issues decided by the regional director but for the purpose of determining whether his ruling was arbitrary and capricious.

[18] It has been conceded throughout that Mrs. Kane's name was on the list. While the regional director seems to have omitted any express affirmative finding of this fact, he did find that respondent "did not exclude her from the list they believed eligible to vote" (R. 37, 109) and that four or five days prior to the election, the respondent knew she had applied for unemployment compensation but did "nothing to correct the eligibility list" (R. 37, 111). At the subsequent unfair labor practice hearing, respondent's witnesses testified that respondent had included Mrs. Kane's name on the list it submitted and had placed the words "Out Sick" on the list after her name (R. 39, 58, 65). The consent election agreement expressly included among the eligible voters, "employees who did not work during such pay-roll period because they were ill" but "excluding any employees who have since quit" (R. 37, 104).

111);[2] that respondent had two of its representatives, accompanied by company counsel, at the election as observers (R. 37, 110);[3] that the Board agent conducting the election had instructed these representatives of the respondent of their right to challenge any ballot (R. 37, 110); and that Mrs. Kane cast her ballot in the election in the presence of these observers who did not challenge her right to vote (R. 37, 111). The regional director also found that prior to the count of the ballots, the respondent's observers conferred with counsel when asked to certify that the election had been properly conducted, and after approval by counsel, both signed the usual Certification on Conduct of Election (R. 37, 111).

The Report on Objections noted respondent's contention that, irrespective of any oversight or neglect on its part, the vote cast by Mrs. Kane

[2] The notice of claim mailed to respondent on May 1, 1944, was received in evidence at the hearing in the unfair labor practice proceeding (R. 59–60) and it disclosed that the form application filed by Mrs. Kane had been filled out giving "Date of Separation" from the respondent as March 1944 and "Reason for Separation" as "Left—Couldn't continue to do heavy work of carrying bundles which was part of her job" (R. 60, 116).

[3] At the hearing in the unfair labor practice proceeding, witnesses called by respondent identified the two company observers as a company pay-roll clerk and a factory office clerk (R. 72–73), and testified that whether an employee had been absent from work for a long period of time was within the knowledge of these two employees as part of their duties for the respondent (R. 73).

was ineligible beyond question (R. 37, 109) and noted also respondent's offer to support this contention by a statement signed by Mrs. Kane on May 8, 1944, in the presence of witnesses, in which she said that she "left the employ of A. J. Tower Co. in March 1944, because of sickness and have been treated by Dr. Theodore who found that I was not able to engage in any gainful occupation. I applied for social security benefits because of this. I signed a paper for the Union at the Tower Co. as I felt it was a good thing. I voted for the Union at the election on last Friday. I have not worked since leaving the Tower Co. because of my physical condition" (R. 37, 109).

The Report on Objections then stated that an agent of the Board interviewed Mrs. Kane on May 23, 1944, and was told by her that (R. 37, 109–110):

> On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think that my application for unemployment benefits would be considered a termination from the Company. I am 64 years of age and have a certificate from my physician as to my general poor health. On May 5,

1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself as an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.

On May 8, 1944, Mr. Ellberry of the Co. and another gentleman whose name I've forgotten visited me at my home and questioned me. I informed them that I thought the Union was a good thing but I do not recall ever telling them exactly how I voted at the election. I have read a copy of a statement that I signed on May 8, 1944, for Mr. Ellberry but my words have been misconstrued. I did say "I applied for social security benefits because of this" but the sentence should have been continued to show it was because of my sickness and not infer that I had left the Company because the work was too heavy.

Shortly after I took sick, I wrote a note to Miss Stone, in the office of the A. J. Tower Co., which Miss Higgins a fellow employee carried for me. In the note, I told Miss Stone that I was under a doctor's care and that I intended to return to the Company as soon as I was well.

Incidentally, when Mr. Ellberry was at my home on May 8, 1944, I told Mr. Ellberry that I intended to return to my job as soon as I was able * * *.

The regional director pointed out that, despite Mrs. Kane's statement to the agent of the Board,

subsequent investigation confirmed the fact that Mrs. Kane did advise the Division of Employment Security on April 28, 1944, that she had left her employment with the Company in March and that the reason stated was her inability to do the heavy work of carrying bundles (R. 37, 110). The regional director, however, also found that a notice of Mrs. Kane's claim for unemployment compensation was sent to the respondent by the United States Employment Service on May 1, 1944 (R. 37, 110). He pointed out that the respondent contended that it did not know when it received this notice, but did not deny that the notice was received prior to the date of the election; accordingly, the regional director found that respondent failed through oversight to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared to cast her ballot (R. 37, 112).* He further observed that "Whether or not Mrs. Kane was an employee entitled to vote was, under the circumstances, a

* The finding as set forth above is contained in an amendment to the Report on Objections which the regional director made on May 31, 1944, as the result of a letter dated May 26, 1944, from counsel for respondent, who objected to the manner in which the regional director had worded this paragraph in his original report (R. 37, 112). Before it was amended the paragraph read (R. 37, 110):

> The Company contends that it does not know the exact date of receipt of the notice of claim, but concedes that it was undoubtedly received prior to the day of the election, and that it failed through over-

fact peculiarly within the Company's knowledge. Yet it was not until four days after the election that they raised any objection to her vote" (R. 37, 111).

The regional director concluded his Report on Objections by ruling that "although the question of Mrs. Kane's status as an employee is not clear * * * under the circumstances set forth, the Company has waived its right to challenge her vote or to object to the election on this ground. To hold otherwise would vitiate the Board's procedure of having observers present at the polls, and challenges by such observers; and of certifications of conduct by the parties". (R. 37, 111.)

This determination made it unnecessary for the regional director to comply with respondent's re-

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sight to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls.

As amended the paragraph reads (R. 37, 112):

> The Company contends that it does not know the exact date of receipt of the notice of claim, but does not deny that it was received prior to the date of the election, and in opinion of the undersigned it failed, through oversight, to correct the voting list or challenged the eligibility of Mrs. Kane when she appeared at the polls.

No point with respect to this amendment was made by respondent during the unfair labor practice proceeding. Indeed, the position taken by respondent's representatives in that subsequent proceeding makes it seem likely that respondent's desire to have the paragraph in its amended form rather than its original form was more a matter of technicality than of substance (See R. 56–60, 65–69).

quest that he rule on the ballot previously challenged by the Union at the polls, since it could not affect the clear majority of the Union (R. 37, 111). Accordingly, he found that the Union had received a majority of the valid votes cast and that it was, therefore, the exclusive representative of all the employees in the appropriate unit (R. 37, 111).

II

THE UNFAIR LABOR PRACTICE PROCEEDING

On June 9, 1944, the Union filed with the Board (in a proceeding designated by the Board as Case No. 1–C–2416), a charge alleging that the respondent had refused to bargain collectively with it (R. 34, 96–97). The Board thereupon issued its complaint against respondent, and respondent answered admitting that it had refused to bargain collectively with the Union but denying that the Union had ever been designated by a majority of the employees in the appropriate unit (R. 34, 94–96, 98–99). The answer asserted that the result of the consent election of May 5, 1944, could not be relied on as establishing the Union's representative status because if Mrs. Kane's vote were subtracted from the vote received by the Union and if the ballot challenged by the Union were opened upon overruling the challenge and proved to be against the Union, the outcome of the election would be a tie vote (R. 34, 98–99).

At the hearing before the trial examiner, the attorney for the Board introduced a stipulation signed by all parties which recited the facts pertaining to the representation proceeding and the subsequent request of the Union for bargaining and respondent's refusal to bargain "until the Union shall have been validly chosen as the bargaining agent of the majority of the employees in the unit in which the election was held" (R. 35, 100–102).

After the usual proceedings, the Board, on March 23, 1945, issued its findings of fact, conclusions of law, and order (R. 10–16), holding that it would not disturb the rulings of a regional director on questions arising out of a consent election unless such rulings appeared to be unsupported by substantial evidence or were arbitrary or capricious, and that the record in the instant case presented no such grounds for disturbing the ruling of the regional director that the respondent could not for the first time challenge the vote of Kane after the results of the election had been announced (R. 11). The Board, as an alternate basis of its decision, pointed out that, quite apart from the effect of the consent election agreement, the Board itself would have reached the same conclusions as the regional director respecting Mrs. Kane's vote (R. 11–12). The position of the Board respecting such post-election challenges is stated in its decision as follows (R. 12):

> We have consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result. Moreover, a post-election challenge forecloses identification of the ballot which would otherwise have been segregated. Since the challenged ballot may have been cast against the Union, [evidence as to how it was cast being unacceptable,] it would be necessary, in order to sustain such a challenge, to set aside the election even though a majority of the valid votes have been cast for the Union. We do not believe it to be sound administrative practice to overturn an election under these circumstances when such a result flows from the fault of the objecting party.

The Board therefore entered an order requiring respondent to cease and desist from its unfair labor practice and to take the affirmative action of bargaining collectively with the Union (R. 13–16).

Upon the Board's petition for enforcement of its order, the court below construed the National Labor Relations Act as making it a jurisdictional prerequisite to any determination that an employer has committed the unfair labor practice of refusing to bargain collectively, that the union

with which he has refused to deal should have been chosen by a majority of those voting who were in fact employees (R. 121). The court therefore concluded that, under the facts of the case, "the Board had no jurisdiction to find the Company guilty of violating Section 8 (5) in the absence of a finding that Mrs. Kane was an employee on the date stipulated" (R. 121–122). It accordingly set aside the Board's order and remanded the cause to the Board for further proceedings not inconsistent with its opinion (R. 123).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In construing the National Labor Relations Act as making it a jurisdictional prerequisite to any determination that the respondent committed the unfair labor practice of refusing to bargain collectively, that the Board find that Mrs. Kane was in fact an employee on the date she cast her ballot in the election conducted by the Board's regional director.

2. In holding that although there is no reliable method of determining for whom Mrs. Kane voted, since her ballot was commingled with the other 230 ballots, the court must assume she voted for the Union.

3. In holding that the Board must consider the post-election challenge of Mrs. Kane's eligibility to vote in the election.

4. In holding that the Board could not give effect to the consent election agreement entered into between the Union and the respondent insofar as it made the rulings of the regional director final and binding on all questions as to the conduct of the election.

5. In holding that the Board could not treat, as final and binding, the regional director's ruling that respondent, by failing to challenge Mrs. Kane's right to vote prior to the time her ballot was commingled, had waived its right to question her eligibility.

6. In holding that the Board was required to go behind the findings of the regional director, made under the terms of a consent election agreement entered into between the Union and the respondent, that the Union is the exclusive representative for purposes of collective bargaining of the employees in the unit specified in the consent election agreement.

7. In holding that the Board must determine whether Mrs. Kane was an employee of the respondent on the eligibility date and on the date she voted.

8. In setting aside the Board's finding that the Union was the exclusive representative for purposes of collective bargaining of the respondent's employees in an appropriate unit.

9. In setting aside the Board's finding that the respondent had committed an unfair labor prac-

tice by refusing to bargain collectively with the Union.

10. In setting aside and refusing to enforce the Board's order.

SUMMARY OF ARGUMENT

I

Congress left to the Board the task of fixing rules to govern the conduct of elections in which employees might choose representatives for purposes of collective bargaining. So long as the rules adopted by the Board afford reasonable assurance that only those eligible to participate in the election will do so, they are not vitiated because some possibly unqualified person does in fact vote. The Board's election procedures allow all interested parties to raise any question of eligibility at any time prior to the commingling of the ballots. Such issues may be raised and settled by the consent election agreement or the decision and direction of election. They may also be raised at the time the eligibility list is prepared by the employer and submitted to other parties. And at the time the voting takes place, still a third opportunity is afforded all interested persons to challenge any person who seeks to cast a ballot. The employer and the contesting unions usually have observers present at the election for the purpose of challenging voters. If such a challenge is made, the ballot of the questioned voter is segre-

gated so that its identity will not be lost through commingling with the other ballots. The eligibility of the challenged voter is only decided if the results of counting the unchallenged ballots are so close as to make it possible that the challenged ballots may affect the outcome. If it is then decided that the challenged voter is eligible, his ballot is opened and counted. If it is decided that he is ineligible, his ballot is never opened.

This procedure affords reasonable assurance that only eligible persons will vote. The harmful consequences which would flow from a procedure which permitted questions of eligibility to be raised after the ballots had been commingled far outweigh any advantages to be gained from such a procedure. Since the identity of the ballot has been lost, there is no accurate means of determining how the ballot was marked. Inquiries of the voter are unreliable, invade the secrecy of ballot, and subject the voter to risks of incurring employer or union disfavor. The Board has decided, therefore, not to try the issue of how an unchallenged voter marked his ballot. Were the Board to permit post-election challenges to eligibility, it would have to set aside the results of the election and conduct a new election whenever an unqualified voter cast an unchallenged ballot. Such a course violates all the principles of finality of elections. If the point of commingling the ballots is not properly the limit for raising chal-

lenges to eligibility no later point of time can be fixed with greater validity. An election would therefore never be final unless the Board undertook the laborious task of ruling on the qualification of each voter. The number of voters casting ballots in its elections makes this an impossible task.

The Board's refusal to accept post-election challenges is supported by many cases applying a similar rule in political and corporate elections. There is even more reason to follow this rule in elections to choose collective bargaining representatives because otherwise unscrupulous employers, through their control over pay rolls, would have an inducement to supply eligibility lists containing the names of anti-union workers who have ceased to be employed in the hope that, if the union won, the election would have to be set aside because of the possibility that the unqualified voters cast their ballots for the union.

II

Quite apart from the validity of the Board's refusal to accept post-election challenges, the respondent in the instant case is bound by the results of the election because it signed a consent election agreement. Both the Board's rules and regulations and the consent election agreement provide that in elections conducted under consent procedures, the rulings of the regional director

on all questions pertaining to the election shall be final. Such consent election procedures constitute an appropriate method for ascertaining bargaining representatives.

In the instant case, the regional director ruled that the respondent was estopped from challenging a voter after the balloting had ended. The Board analogized the consent election agreement to an arbitration agreement and held that the regional director's ruling, being neither arbitrary nor capricious, was binding on the respondent. The respondent had placed Mrs. Kane's name on the eligibility list, and had the facts, on the basis of which it urged that she was disqualified, in its possession for four days before the election without trying to correct the list. Moreover, while the respondent was represented at the balloting by observers, it allowed Mrs. Kane to vote without objection. These considerations, added to the fact that respondent's policy of continuing on its pay roll workers out ill was such as to make the question of Mrs. Kane's employee status on the date she voted a very close technical one, were sufficient to make the regional director's determination wholly reasonable.

ARGUMENT

The Board's decision in this case rests on two alternate grounds: (1) The respondent, having failed to show that the regional director's ruling with respect to the challenge to Mrs. Kane's vote

was arbitrary or capricious, is bound thereby under the terms of the consent election agreement (R. 11);[5] and (2) disregarding the consent election features of the case and testing the regional director's rulings by standards applicable in Board-directed elections, his ruling was "in complete accord with established principles and policy of the Board" (R. 12). The acceptance by this Court of either of these grounds would require that the decision below be reversed with directions to enforce the order of the Board. In this brief, we shall deal first with the second basis for the Board's decision and then with the first, more narrow, ground.

[5] In applying the provisions for finality of the rulings of the regional director in consent election cases—provisions found in Article III, section 12 of the Rules and Regulations (*infra*, pp. 81–82) and in the consent election agreement itself (*supra*, p. 4)—the Board refuses to disturb "rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" (R. 11; cf., *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156, 159, enforced, 140 F. 2d 754, 758–759 (C. C. A. 6), certiorari denied, 322 U. S. 763), and upholds the regional director's rulings "regardless of how we might have determined the question if the respondent had not authorized the Regional Director to determine it" (*Matter of Aetna Firebrick Co.*, 56 N. L. R. B. 849, 854).

I

THE BOARD, BY STANDARDS APPLICABLE IN BOARD-DIRECTED ELECTIONS, PROPERLY REFUSED TO ENTERTAIN THE POST-ELECTION CHALLENGE TO MRS. KANE'S ELIGIBILITY

Whether a union has been selected by a majority of eligible employees is an issue, the resolution of which has been largely committed by Section 9 (c), *infra*, p. 76, to the Board.[6] Section 9 (c) authorizes the Board to "take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives", and, in so doing, the Board is, we believe, empowered to adopt and execute such reasonable policies and practices as will serve, in the great mass of cases that come before it, to ensure an accurate, efficient and speedy determination of the wishes of the majority.

This Court, in construing Section 2, Fourth, of the Railway Labor Act, which, much like Section 9 (a) of the Wagner Act, *infra*, pp. 75-76, provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act", found that Congress intended to adopt the principle of political elections, under which a majority of those voting in an election, although less than a majority of

[6] See *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 380.

the eligible voters, are accorded the right of determination. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 560. The legislative history of the National Labor Relations Act also makes it clear that, in Section 9 (a), Congress intended to adopt the majority rule principle sanctioned by "governmental practices" and "democratic institutions". S. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. It follows, we think, that the standard by which the legitimacy of the Board's election practices, as applied in this case, is to be judged, was intended to be the same as that generally accepted with respect to political and corporate elections—a standard of reasonableness. The court below fell into error when it failed to apply this standard and rested its decision solely on a literal reading of Section 9 (a). This reading of Section 9 (a) is inconsistent with the decision of this Court in the *Virginian Railway Co.* case and the uniform decisions of many circuit courts of appeals[7] holding that the major-

[7] *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. 2d 586, 588 (C. C. A. 2), certiorari denied, 313 U. S. 594; *National Labor Relations Board* v. *The Standard Lime and Stone Co.,* 149 F. 2d 435 (C. C. A. 4), certiorari denied, 326 U. S. 723; *National Labor Relations Board* v. *Whittier Mills Co.,* 111 F. 2d 474, 477–478 (C. C. A. 5); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. 2d 144, 148–149 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *Central Dispensary and Emergency Hospital,* 145 F. 2d 852 (App. D. C.), certiorari denied, 324 U. S. 847.

ity rule requirement is not so absolute as to forbid a practical adjustment by which the desires of a majority of employees actually voting may control. The entire scheme of the National Labor Relations Act persuasively indicates that Congress was not undertaking "the impossible task of specifying in precise and unmistakable language each incident"[*] but, rather, was merely adopting certain basic concepts to be implemented by the Board in dealing with the problems which came before it.

Majority rule as a principle for governing any group, whether for political, corporate, fraternal or collective bargaining purposes, is only workable when more or less formal machinery is established for the periodic recording of the desires of those to be governed. Since no one has yet devised a litmus paper which will automatically indicate changes in the sentiment of any group of people, the accepted device for ascertaining the will of the majority is the election. Experience with elections over the years has shown that the fairest determination of the will of the majority occurs when there is secrecy of ballot, all questions respecting eligibility to vote are determined prior to the casting of ballots, and the results of the election when announced are given

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[*] *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 798.

complete finality. That departure from any of these standards substantially impairs the chances that the outcome of the election will actually reflect the desires of the electorate hardly requires elaboration. Any procedure which allows questions of eligibility to be raised after ballots have been commingled impairs the secrecy of the count.

The machinery devised in political elections to insure secrecy of the ballot and to settle all questions of eligibility before the casting of the ballot, while differing in detail as it is utilized in the various states, follows basically the same principle. There is either the government printed ballot, which in order to secure uniformity so that no ballot bears identifying marks, permits no writing on its face except the making of one or more X marks in appropriate boxes, or, more recently, the voting machine. There is the registration list, which is closed a certain number of days before the election, during which time it may be publicly inspected and hearings held to determine whether questioned registrants should be purged from the list. When advocates of fair elections first introduced these devices, attacks upon the legality of the registration device, among others, were frequently made because they introduced departures from literal concepts of majority rule. In a few of the first cases to come before the courts, registration statutes were even held unconstitutional because those who became otherwise eligible

between the date of closing the registration books and the election, as by moving into the jurisdiction or reaching voting age or acquiring the requisite property, were disenfranchised. In other words, the use of the registration device fixed the electorate as of the last day for registration whereas the election purported to record the will of the electorate as of another date. But soon courts came to realize that such departures from literal majority rule caused little harm as weighed against the abuses which could only be corrected by registration lists. Accordingly, the test for judging the constitutionality of such statutes became solely their reasonableness, not whether they failed to make the election a record of a literal majority of the actual electorate on the date ballots were cast.[9] Judged by the test of reasonableness, we submit that the Board's rules respecting post-election challenges are valid.

A. *The election procedures established by the Board afford reasonable assurance that only eligible persons will vote.*—The determination as to whether any given rule governing the conduct of an election is reasonable can only be made when the abuses which that rule is designed to correct or eliminate are understood. Whereas in political elections the chief abuses towards which most modern election reforms are directed arise from

[9] See cases collected in *Constitutionality of Statutes in Relation to Registration before Voting at Election or Primary*, 91 A. L. R. 349.

corrupt political machines, in elections conducted by the Board, the chief abuses against which the Board must guard arise from the fact that the employer can control the number of employees who are within the unit from one day to another by increasing or decreasing the number he hires.[10] So the Board in each case must select the date as of which the employee group to constitute the electorate is to be fixed. In consent elections, the date is fixed by agreement of the parties and approval of the regional director. In Board directed elections, the Board tries in a formal hearing the issue of the date to be chosen for this purpose. The Board's resolution of this issue normally takes the form of designating the payroll of a fixed date, which is known as the eligibility date.

But besides determining the date of the pay roll, the Board also makes certain rulings as to the scope of the electorate and as to eligibility

[10] For express Board recognition of this fact, see *Matter of Elliott Bay Lumber Co.*, 9 N. L. R. B. 3, 4: "The Board considers that except under unusual circumstances, the choice of an eligibility date prior to the hearing is desirable in order to insure an eligibility list free from the possibility of changes effected subsequent to the hearing in order to influence the results of the election." As is usual in consent election agreements, the eligibility date here agreed upon antedated not only the signing of the agreement but also the beginning of the representation proceedings. The petition for certification of representatives was filed on April 24th (R. 37, 103), the agreement was signed on April 27th (R. 37, 106), and the eligibility date was April 21st (R. 37, 105).

qualifications, all of which may result in additions to or subtractions from the pay roll as maintained by the employer. The scope of the electorate is resolved by determining which occupational groups or classes constitute an appropriate unit for purposes of collective bargaining. The Board regards the determination as to whether a position involving fifty percent supervision and fifty percent manual labor should fall within the unit of production and maintenance employees or within the unit of supervisors as essentially a unit problem rather than an eligibility problem.[11] Eligibility issues, as distinguished from unit issues, involve questions not as to the type or kind of work a person does but whether the person has sufficient tenure of employment to justify his participation in the election. The Board regards as an eligibility problem the determination whether temporary, intermittent, probational, part-time or laid off employees, who perform work of the type within the unit, should be

[11] See, for instance, *Matter of Holgate Brothers Company*, 31 N. L. R. B. 485, 487 (foremen doing manual labor excluded from a unit of production and maintenance employees when none of them spend more than twenty-five percent of their time in actual production work); *Matter of Virginia Bridge Co.*, 29 N. L. R. B. 241, 244 (unit of production and maintenance employees defined to exclude foremen who spent at least fifty percent of their time in actual supervisory duties).

held qualified to vote.[12] The function of deter-

[12] See for instance, *Matter of Mobile Steamship Ass'n*, 8 N. L. R. B. 1297, 1318–1319 (longshoremen, banana handlers, clerks and checkers who worked in each of any eight weeks during a six month period preceding the Board's decision held eligible); *Matter of Monon Stone Company*, 10 N. L. R. B. 64, 74 (in election covering quarry workers of 14 companies employees who had worked for at least 60 days during year preceding Board's decision held eligible with proviso that where employee had worked for more than one of the 14 companies he was to vote in unit covering company with which he had worked the longest aggregate period); *Matter of KMOX Broadcasting Station*, 10 N. L. R. B. 479, 485 (radio artists who performed before microphone in any regular program at any of four radio stations involved at any time during three month period preceding Board's decision held eligible); *Matter of Rock River Woolen Mills*, 18 N. L. R. B. 828, 834 (employees laid off because of installation of new machinery, whose likelihood of reemployment was slight, held not eligible); *Matter of Standard Oil Co.*, 23 N. L. R. B. 860, 865 (where company was conscientiously attempting to reinstate seamen laid off as result of transfers of ships made after the passage of the neutrality laws shortly after the outbreak of war, Board ruled they were eligible to vote); *Matter of Walton Lumber Co.*, 20 N. L. R. B. 573, 576 (seven employees, assigned as watchmen for another company which had assumed part of the premises of the company involved in the representation proceeding for the purposes of securing a loan, held eligible where they were expected to return to the company's pay roll upon termination of the security arrangement); *Matter of American Steel Scraper Co.*, 21 N. L. R. B. 218, 220–221 (employee held eligible where he had been laid off and secured other, but inferior, position, and had expressed preference for his original job and company indicated he was likely to be reemployed); *Matter of Home Mfg. Co.*, 26 N. L. R. B. 916, 919 (although the company kept a list of competent persons laid off each season with intent to secure their services at the beginning of the following seasons, few such employees were in fact available for reemployment from year to year and they were held ineligible).

mining appropriate units may be analogized to the function of establishing the jurisdictional boundaries of political subdivisions. Both of these functions serve to fix the outside boundaries within which the electorate must fall as well as to define the group of persons who will be governed by those elected. And just as in political jurisdictions those who will be governed by the laws applicable to the jurisdiction outnumber those eligible to vote, so also in collective bargaining elections, those who are bound by the terms of any collective bargaining contract applicable to the unit may exceed those deemed qualified to vote; thus casual or part-time workers or those hired subsequent to the eligibility date may be in the unit but may not be eligible to vote.[13] The resolution of eligibility issues for elections to choose representatives for purposes of collective bargaining may be analogized to such features of the political election as the setting and applying of standards of citizenship, residence or age.

[13] For express recognition by the Board that, although all persons performing the functions of the workers within the unit are to be regarded as within the unit and therefore subject to the terms of the collective bargaining agreement applicable to the unit, some of these persons may work so intermittently as not to justify granting them a vote, see *Matter of Wadham's Division of Socony Vacuum Oil Co.*, 54 N. L. R. B. 1164, 1167–1168; *Matter of The Post Printing and Publishing Co.*, 59 N. L. R. B. 1115, 1120–1121.

The Board's procedures are designed with the objective of having available at the time the voters present themselves for the casting of their ballots, a list of those eligible which is entirely accurate in every respect. To this end, at several stages of the preparation for the holding of the election, steps are taken to iron out all issues respecting eligibility. When a formal Board hearing precedes an election, all parties are urged to try before the Board all questions of eligibility which they anticipate will arise at the election. Then the Board, in its decision and direction of election, rules on all such issues raised. But, so long as the later challenge is made at or before the election, no one is barred from raising any eligibility issue because of failure to raise it in such a hearing, even though he knew all the facts and withheld them. In consent elections, the parties are able to agree on all the issues either party has raised prior to the signing of the agreement and this agreement is approved by the regional director. If the parties cannot agree, they usually do not sign such an agreement but go to formal hearing before the Board. After the Board decision and direction of election is issued or the consent election agreement is signed, the next step is the actual preparation of the list for use in checking voters at the election. To this end, the regional director at once secures from the employer both a list of the eligible employees on

the pay roll on the eligibility date set by the Board or fixed in the consent election agreement as well as a list of those on the pay roll who are not eligible.[14] The Board then prepares an eligibility list in conformity with the voting scheme adopted for the election. Thus, in the event voting is to be done by departments, the list is arranged by departments. The listing is alphabetical, unless the workers' familiarity with their clock numbers permits a numerical arrangement. After the list has been secured, a conference is arranged for the purpose of affording all parties an opportunity to check it. The whole list or each portion agreed upon by all parties is appro-

[14] We are not here concerned with the procedure followed where the employer refuses to supply such a list. Sometimes the Board subpoenas the payroll. But in instances where the Board decides that the election should proceed without awaiting subpoena action, it has an established procedure for "voting by affidavit," where the Board agent present at the election examines each person claiming eligibility as to his identity and qualifications and then has him execute an oath respecting his eligibility in affidavit form. See for example, *Matter of Cushman Shoe Co.*, 2 N. L. R. B. 1015, 1030; *Matter of Metro-Goldwyn-Mayer Studios*, 8 N. L. R. B. 858, 863; *Matter of Cudahy Packing Co.*, 26 N. L. R. B. 749, 27 N. L. R. B. 108; *Matter of National Mineral Co.*, 27 N. L. R. B. 432. The Board's procedure in the latter case received judicial approval in *National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 428 (C. C. A. 7), certiorari denied, 320 U. S. 753.

priately initialed or signed.[15] While all parties are urged at this stage to raise all questions of eligibility of which disposition has not already been made, again failure to raise any issue, even though all facts are known, does not bar any party from making a challenge based thereon at the election.[16]

At the time the balloting takes place, the Board makes further provision for assuring that only those eligible will cast ballots. The employer and the union are each allowed to station an equal number of authorized observers at the polling places during the election who may challenge the eligibility of any person who applies for a ballot. The consent election agreement signed by respondent in the instant case specifically so provides (R. 37, 105).[17] The practice

[15] In the instant case the employer concededly was in full agreement with the list prepared, as it was in fact used in the exact form submitted by it (R. 48).

[16] Compare the decision of the New York State Labor Relations Board in *Matter of "Hunt" for Chevrolets*, Decision No. 3593, Case No. WE-421, July 8, 1946, 18 L. R. R. M. 1229, where that Board points out that it would have been better for the union to contest the employer's inclusion of an employee in the list prior to the election, but that since the union knew only part of the facts before election, the challenge was timely.

[17] Although the Board at one time followed the practice of refusing to permit employer representatives to be present at the polls if any union objected (see *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 32, 33, 37; National Labor Relations Board, *Third Annual Report*, p. 147), for the past three years it has permitted the employer

followed here, of having the observers fully instructed by members of the Board's staff, prior to the election, of their right to challenge any person seeking to cast a ballot whom they believe ineligible to vote (R. 37, 110), is also one generally followed by the Board in all elections. If any person's right to vote is challenged, he is allowed to mark a ballot but instead of depositing it in the ballot box with the other ballots where its identity would be lost, he is required to place it in a sealed envelope which is then marked to show whose ballot it contains. The Board has described this as "a simple and efficacious procedure" which effectuates "a separation of the ballot of the challenged voter for subsequent consideration of the Board without jeopardizing the entire election."[18] The segregated ballot is never opened unless the opposing votes are sufficiently close so that the challenged ballot might

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in all cases to have observers selected from among the nonsupervisory employees. Indeed, it is the present policy of the Board to have its agents urge the employer, as well as all other interested persons, to have observers at the election. If the employer nevertheless fails to appoint an observer, the Board has on occasion asked the person responsible for preparing the eligibility list for the employer to serve as the employer's observer. See *Matter of Worcester Woolen Mills Corp.*, 69 N. L. R. B. No. 51.

[18] *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512; *Matter of Chrysler Corp.*, 63 N. L. R. B. 866, 867.

affect the outcome.[19] In the latter event, the regional director rules upon the challenges and, if the challenges are overruled, the envelopes are opened and the challenged ballots counted. If the challenges are sustained, the envelopes are never opened.[20]

We submit that the foregoing recital of the provisions which the Board has made to assure that only those who are eligible shall vote in its elections—provisions which were fully executed in the instant case (see *supra*, pp. 6–8, 9–10, 16–17)—demonstrates that the Board has not only afforded all parties reasonable opportunity to raise any issues of eligibility but has also taken reasonable precautions against abuse of its ballot box.

B. *The Board's refusal to entertain post-election challenges is a reasonable measure designed to assure secrecy of the ballot and finality of the election.*—If no issue of eligibility has been raised by any party prior to the time that the allegedly ineligible person casts his ballot, and its identity is thus lost by commingling with the other ballots, the Board refuses thereafter to entertain such an issue unless either the Board's agents or the party to benefit from the Board's refusal to entertain

[19] The manner in which the ballot challenged by the union in the instant case was handled (R. 37, 39, 52–53, 80, 81–82, 111, 115) is typical of Board procedure in such situations.

[20] The procedure respecting challenged ballots here described appears in the Board's Rules and Regulations, Article III, Section 10, which is set forth *infra*, pp. 79–81.

the issue knew of the voter's ineligibility and suppressed the facts.[21] Since there has never been even an intimation in the case at bar that anyone other than the respondent itself had any reason to suppose that Mrs. Kane might have been ineligible to vote, no attention need be given to the exact bounds of this exception to the Board's general practice of refusing to consider post-election challenges to the eligibility of persons who cast ballots.[22]

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[21] In instances where a Board agent allows a person he knows to be ineligible to vote without challenge, the employer has a valid objection to the conduct of the election and the Board will set it aside and order a new one. This the Board did in *Matter of Wayne Hale*, 62 N. L. R. B. 1393, 1394, in which the employer, in support of his objection to the conduct of the election, showed that the union's observers and the Board's agents present at the election permitted a foreman, whom they knew the Board had specifically excluded from the unit, to vote without challenge, and that the employer did not have an observer present at the election. Similarly, in *Matter of Beggs & Cobb, Inc.*, 62 N. L. R. B. 193, 194–195, the A. F. L., in support of its objections to the conduct of the election, showed that the employer had notified the Board prior to the election that eight persons on the eligibility list were no longer in its employ, five of the eight appeared at the polling place, they were permitted to cast their ballots without challenge although the Board agents, company observers and C. I. O. observers present knew of their ineligibility but the A. F. L. did not, and the C. I. O. received three more votes than the A. F. L. in the election.

[22] The Board refused to entertain post-election challenges in the following cases involving Board-directed elections: *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739, 740; *Matter of Denver Publishing Co.*, 61 N. L. R. B. 338, 339; *Matter of Owens-Corning Fiberglas Co.*, 61

As the Board pointed out in its decision (R. 12), it has "consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result." If any other doctrine were followed, in close elections it would be to the advantage of the losing union or the employer to raise issues and require proof as to the status of innumerable voters in the hope that doubt would be cast upon enough votes to require a new election. Since the Board's policy regarding eligibility permits numerous persons to vote even though they do not work on the day of the election, as, for example, employees temporarily laid off, or ill, or on vacation, or in the armed forces, it is apparent that the possibilities of attack on the eligibility of voters are varied and plentiful. Furthermore, if post-election chal-

N. L. R. B. 546, 551–552; *Matter of Harry Manaster & Bro.*, 61 N. L. R. B. 1373, 1374; *Matter of Chrysler Corp.*, 63 N. L. R. B. 866, 868; *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 511–512; *Matter of John Price, Sr.*, 67 N. L. R. B. No. 146; *Matter of Worcester Woolen Mills Corp.*, 69 N. L. R. B. No. 51; and in the following cases involving consent elections: *Matter of Kellogg Switchboard and Supply Co.*, 28 N. L. R. B. 847, 852, 861 (alternative holding); *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156, 157–159, enforced, 140 F. 2d 754 (C. C. A. 6), certiorari denied, 322 U. S. 763.

lenges are permitted, the unscrupulous employer will be given a strong inducement to include on the payroll submitted the names of persons whose status as employees is dubious or non-existent in the hope that he can thereby invalidate the election. He may include the names of permanently laid off employees whom he knows to be anti-union, notify them to vote in the hope that some will escape challenge at the election, and yet raise the point thereafter that the election results are invalid because of their ineligibility and the possibility that they had voted for the union. In most instances of employees not working on the day of the election, neither the Board nor the union is in a position to know whether the employees have indicated to the employer an intention not to return to work or whether the employer has discharged them. The dangers of allowing post-election challenges by employers to the employee status of persons included by the employer on the payroll submitted for use in the election are much greater than those which attach to post-election challenges in other elections where the challenging party does not prepare the eligibility list.

Aside from the risk that the employer will knowingly include in the eligibility list persons of questionable employee status, the knowledge that the Board would entertain post-election challenges would lead parties to think of election

results, not as conclusive, but rather as an invitation to litigate eligibility issues. The election would cease to perform the healthy role which Congressional proponents of the bill which became the Act had in mind when they stated, "the device of an election in a democratic society has, among other virtues, that of allaying strife, not provoking it."[23] The vice of entertaining post-election inquiries into eligibility in political elections has been explained as follows:[24]

> * * * to allow such scrutiny is to hold out strong temptation * * * since * * * if an issue may be made on the right of every individual voter, it will be easy * * * to prolong a contest * * * and to keep perpetually before the courts the same excitements, strifes, and animosities which characterized the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with the close of the polls.

Nor are these all the harmful results which flow from permitting post-election challenges to eligibility. If the Board should hold a trial on the issue of eligibility and decide that the challenge was well taken, the problem would still exist as to whether the ballot cast by the disqualified voter did in fact affect the outcome of

[23] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22.

[24] Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1416.

the election. For if he voted for the losing side, the practical results of the election are no different than had he not voted. Since the identity of the ballot has been lost because of the failure to challenge prior to its commingling with the other ballots, there is no reliable method of determining how the ballot was marked.[25] Circumstantial evidence, such as the voter's statements prior to the election of his wishes respecting the outcome of the election or of his intention to cast his ballot for a given side, or his statements after the election of his pleasure or displeasure with the outcome or how he did in fact vote, has little probative value. Even the testimony of the voter himself as to how he marked his ballot may be almost worthless. As the Board stated in rejecting respondent's tender of a signed statement by Mrs. Kane that she voted for the Union (R. 12):

> Because of a reluctance to antagonize the employer or the Union, a voter knowing that his statement could not be verified, would not be likely to disclose the true state of his ballot.

The pressure on an individual voter called on to disclose his vote is varied. If there is only one union involved in the election and it is one which normally operates only on a closed shop basis, the employee would be afraid that the union's knowledge that he actually voted against it might

[25] The court below held (R. 119) that the case must be determined upon the assumption that the challenged ballot was cast in favor of the Union.

in the end cost him his job. And if the employer wished the voter to testify that his ballot was for the union, he could easily assure the employer that he had voted against the union but would happily testify that he voted for it. Even more conflicting pressures exist where there is more than one union seeking to represent the employees.

It should be noted, as illustrative of the uncertain import and credibility of such testimony by voters, that although the respondent produced a statement signed by Mrs. Kane in which she stated that she had voted for the Union (R. 37, 62–64, 71, 109, 117), a Board agent was subsequently told by Mrs. Kane that she did not realize that the statement she signed for respondent contained any affirmation that she voted for the Union (R. 88–89). An affidavit thereafter executed by Mrs. Kane averred that she did "not recollect ever telling them exactly how I voted at the election" (R. 37, 86, 109–110, 115). At the subsequent hearing in the unfair labor practice case, the trial examiner offered to issue a subpoena for Mrs. Kane but each of the parties expressly declined to call her as a witness (R. 53, 83, 85).

Not only is such an inquiry unreliable, but it has the further fault of violating the secrecy of the ballot. As its second reason for rejecting evidence as to how Mrs. Kane voted, the Board stated (R. 12):

> But what is even more important, we cannot sanction the respondent's invasion of the voter's privacy because such a practice would nullify the very purpose of the secret ballot to insure a free and untrammeled choice. Indeed, we would regard as an unfair labor practice an employer's questioning of his employees as to the manner in which they voted in a Board election.

A similar inquiry by agents of the Board would be only slightly less objectionable. The Board, therefore, follows the general policy of refusing to try the issue of how an ineligible person has voted (R. 12).[26] Were the Board to change its practice and receive post-election challenges to eligibility, it would also have either to change its practice of forbidding such invasions of secrecy of the ballot or conduct new elections, in any instance where the challenge proved well taken and might affect the result of the election. Should the Board permit employees to be publicly questioned in the presence of the employer as to how they voted, a serious impediment to free selection of collective bargaining representatives would be raised. Moreover, as to elections already conducted, such a change by the Board would amount to a real breach of faith with many

[26] Compare *Matter of Chrysler Corp.*, 63 N. L. R. B. 866, 868.

millions of the employees who have repeatedly been assured by the Board that they could come and vote in its elections and no one would ever know how any individual employee voted. As to future elections, the result would be to deter employees from voting since the Board would have to let them know that if post-election challenges were made, they might be called upon to disclose their vote. The Board has indicated that if it were to entertain post-election challenges it would not follow this alternative but would instead conduct a new election despite the unjust disfranchisement of all of those who voted in the first election which this might entail. The Board stated (R. 12):

> Since the challenged ballot may have been cast against the Union, it would be necessary, in order to sustain such a challenge, to set aside the election even though a majority of the valid votes have been cast for the Union. We do not believe it to be sound administrative practice to overturn an election under these circumstances when such a result flows from the fault of the objecting party.

There are many cases involving political elections which adopt similar reasoning in refusing to permit post-election challenges to voters whose names appeared on registration lists which could

have been corrected prior to the election. For instance a Louisiana court stated:[21]

> * * * Such an attack must be made prior to the primary election. A candidate should not be permitted to take the chances of securing such votes, and after realizing that he has failed to get them, attack their right to be registered. * * * The jurisprudence is not questioned that the attack on the right of a person to be on the registration roll, must be made before the election is held.

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[21] *Duplessis* v. *Harrell*, 9 La. App. 471, 119 So. 264. See also *Cambre* v. *Brignac*, 19 La. App. 437, 140 So. 702; *Turregano* v. *Whittington*, 132 La. 454, 61 So. 525; *Perez* v. *Cognevich*, 156 La. 331, 100 So. 444; *Bradley* v. *Neill*, 174 La. 702, 141 So. 382; *Hyde* v. *Brush*, 34 Conn. 454; *Moore* v. *Bay*, 149 Md. 286, 131 Atl. 459; *Davis* v. *Town of Saluda*, 147 S. C. 498, 145 S. E. 412; *Re Port Arthur Provincial Election*, 14 Ont. L. 345; *Re McGrath*, 17 Ont. L. 514; *Re Schumacher*, 21 Ont. L. 522. A number of states have statutes barring election contests over the ineligibility of a voter in the absence of a challenge at the polls. For example see Del. Rev. Code 1935, Sec. 2023; Michigan Compiled Laws 1929, Secs. 3122, 3124; New Jersey Rev. Stat. 1937, Sec. 19:15–34. And some states bar a challenge at the polls of any person duly registered on any basis other than that the individual appearing is an impostor for the name registered or that he has been bribed. For example see Del. Rev. Code 1935, Sec. 1862; Conn. Rev. Stat. 1930, Sec. 602; Purdon's Pa. Stat. Ann., Title 25, Secs. 623–38, 807–137, 809–37, 3050 (also for change in residence since registration); Vermont Public Laws 1933, Sec. 118; W. Va. Code 1943, Secs. 80, 118 (or if disqualification occurs subsequent to registration).

In corporate elections, several states allow corporations to fix a date on which to close the corporate books prior to the election and by statute provide that the list of those persons who appear as stockholders on that date is conclusive evidence of the right to vote.[28] Other states provide that the transfer or stock books of the corporation shall be conclusive evidence of those eligible to vote.[29] It is the general rule in corporate elections that once a ballot has been cast without challenge and its identity therefore lost, its validity cannot later be questioned.[30]

The only case involving post-election challenges under the National Labor Relations Act which has been decided by the courts, other than the case at bar, is *National Labor Relations Board* v. *Capitol Greyhound Lines*, 140 F. 2d 754 (C. C. A. 6), certiorari denied, 322 U. S. 763. Since the Board there rested its decision solely on the consent elec-

[28] Montana Rev. Code 1935 Ann., Sec. 5971.1; Throckmorton's Ohio Code Ann. 1940, Sec. 8673-3; Utah Code Ann. 1943, Sec. 18-2-39.

[29] 5 Fletcher, *Cyclopedia of Corporations* (perm. ed.), Sec. 2028; Ballantine, *Corporations* (1927), Sec. 170, p. 569; *People* v. *Robinson*, 64 Calif. 373, 1 Pac. 156; Deering's Calif. Civil Code, Sec. 320a; Del. Rev. Code 1935, Sec. 2061; *Morrill* v. *Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547; New Jersey Rev. Stat. 1937, Secs. 14: 10-5, 14: 10-6; New York-McKinneys Consolidated Laws, Stock Corporation Law, Sec. 47; North Carolina Gen. Stat. 1943, Sec. 55-107.

[30] 5 Fletcher, *Cyclopedia of Corporations* (perm. ed.), Secs. 2017, 2044, pp. 83, 155; *In re Chenango County Mutual Ins. Co.*, 19 Wend. (N. Y.) 635; *Rossing* v. *State Bank*, 181 Ia. 1013, 165 N. W. 254. Cf. *People* v. *Robinson*, 64 Calif. 373, 376, 1 Pac. 156.

tion agreement, the case is fully discussed with that phase of the instant case (see *infra*, pp. 58–59). It is sufficient to note here that the Circuit Court of Appeals for the Sixth Circuit there enforced an order which required the employer to bargain collectively with a union chosen in an election in which the regional director had refused to consider a post-election challenge which might have been determinative of the results of the election. The court construed the Act as vesting in the Board "broad discretion" to make rules governing the conduct of elections (140 F. 2d at 759). And it ruled that the Board had acted within its powers in holding the union there involved the designated representative of the employees without looking into the eligibility issue raised by the post-election challenge.

The reasonableness of the Board's rule barring post-election challenges to the eligibility of voters, therefore, is supported not only by the necessities of the industrial situation, but also by authorities dealing with related problems growing out of political and corporate elections, and the only decision, other than that of the court below, considering the problem under the National Labor Relations Act.

Elections must be final at some point. If the time of the commingling of the ballots cannot be said to be a proper point before which a challenge to the eligibility of a voter must be made, no subsequent point of time could be set with greater

validity. The decision below is based upon a principle which would permit the issue of eligibility to be raised at any time, even in a complaint proceeding following the election. The Board's certification of a union would thus be final as against possible challenges only if the Board had entered into the laborious task of making inquiry and findings with respect to the status of every voter. As is apparent from its description (*supra*, pp. 31–40), the Board's election machinery operates on the premise that the Board will not actually determine the eligibility of any person to vote unless some question of his eligibility is raised prior to the time his ballot is cast. Hence, most of those who vote are persons whose status either as employees or as workers within the appropriate unit has never been the subject of any finding by the Board. If, as the court below holds, such a finding is a jurisdictional prerequisite to the validity of the Board's certification of a union, and cannot be waived or rendered unnecessary by failure to raise the issue in timely fashion, the Board will be required to alter its election machinery materially.[31]

[31] The principle enunciated by the court below would require the Board to determine the membership of an employee in the appropriate unit, equally with his employee status, if a post-election challenge were made as to his eligibility on the ground that his work falls outside the unit; for Section 9 (a) of the Act renders the representatives of a majority of the "employees in a unit" the exclusive representative for bargaining purposes.

Nor could the defect be easily cured. The time and expense which would be consumed by such a change of procedure would mean an end of employee elections on the scale on which the Board has handled them in the past. To date the Board has conducted approximately 30,000 elections[32] and polled more than seven million employees.[33] On at least one occasion, the Board polled approximately one hundred thousand employees in a single election.[34] Any procedure which required that the Board actually determine the employee status of each of these voters would be unworkable and, we submit, was not intended to be required by the Act. What was intended, rather, was that the Board should design machinery to enable it expeditiously to poll large numbers of employees with appropriate safeguards to assure that no one will vote who is not eligible. The machinery above described fulfills this purpose. It has been tested in thousands of elections. The decision in the instant case by the court below is the first instance in which any fault has been found with it. Indeed, the very rarity of the instances in which any question has been raised by either an employer or a union,

[32] See the figures given in National Labor Relations Board, *Tenth Annual Report*, p. 8, plus approximately 7,000 elections held during the fiscal year 1945–1946.

[33] See figures given in National Labor Relations Board, *Tenth Annual Report*, p. 8, plus approximately a million employees polled during the fiscal year 1945–1946.

[34] National Labor Relations Board, *Seventh Annual Report*, p. 33.

and the entire satisfaction so generally voiced over the Board's election procedures, should suffice to show that the decision below was unwarranted by either law or experience.

II

THE BOARD PROPERLY HELD THAT SINCE RESPONDENT HAD SIGNED A CONSENT ELECTION AGREEMENT, IT WAS BOUND BY THE REGIONAL DIRECTOR'S RULINGS WHICH WERE NEITHER ARBITRARY NOR CAPRICIOUS

A. *Article III, Section 12, of the Board's Rules and Regulations, which provides that, in a consent election, the rulings of the regional director on the conduct of the election and the eligibility of voters shall be final, is valid as applied by the Board to mean that all rulings of the regional director on such matters are final unless arbitrary and capricious.*—Acting pursuant to Section 6 of the Act (*infra,* p. 75), which authorizes the Board to make such rules and regulations as may be necessary to carry out the provisions of the Act, the Board adopted a rule (Article III, Section 12, *infra,* pp. 81–82) providing for consent election agreements. The rule enables the parties to a representation proceeding pending before the Board to dispense with all formal proceedings by entering into an agreement as to the scope of the appropriate unit, the time and place of holding the election, and the pay roll to be used in determining what employees within the appropriate unit shall be eligible to vote. The rule

provides that a consent election under such an agreement shall be conducted under the direction and supervision of the regional director in a manner consistent with the method followed by the regional director in conducting elections directed by the Board, except that the rulings of the regional director shall be final.

The consent election has been used by the Board from the first year of its operations.[35] Its popularity has increased to such an extent that in recent years approximately half the elections conducted by the Board are consent elections.[36] The Board has conducted approximately 17,874 consent elections under this procedure, 2,951 of which have occurred in the past fiscal year.[37]

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[35] See National Labor Relations Board, *First Annual Report*, p. 44.

[36] See National Labor Relations Board, *Ninth Annual Report*, pp. 16, 20; *Tenth Annual Report*, p. 10.

[37] The following table shows the number of consent elections conducted by the Board, together with the report of the Board in which this information is made public:

	Number of consent elections
First Annual Report, p. 44	23
Second Annual Report, p. 29	217
Third Annual Report, p. 47	812
Fourth Annual Report, p. 51	481
Fifth Annual Report, p. 18	676
Sixth Annual Report, p. 36	1,932
Seventh Annual Report, pp. 32–34	*3,050
Eighth Annual Report, p. 24	*2,755
Ninth Annual Report, p. 20	2,434
Tenth Annual Report, p. 10	2,543
Fiscal year July 1, 1945–June 30, 1946	2,951
Total consent elections	17,874

*These figures include a number of pay-roll checks and stipulated elections.

In consent election agreements, the parties agree to forego a hearing and formal Board determination of the majority issue and to accept the findings of the regional director as final and binding—much as private parties agree to abide by the decision of an arbitrator. This device works to the advantage of both the parties involved and the Board. To the parties, it affords a speedy and convenient means of resolving any question concerning representation, enabling them to embark upon the process of collective bargaining at an early stage. To the Board, it offers a means of disposing of many of the representation cases which arise before it without the necessity of lengthy and costly formal procedures; thereby also making possible prompt effectuation of the collective bargaining policies of the Act.

To facilitate the consent election procedure, the Board, out of its experience, has developed a printed form of agreement which it furnishes to the parties when they desire to enter into a consent election agreement. This form has blank spaces to be filled in as the parties agree upon the scope of the appropriate unit, time for the election, eligibility date and the like. The agreement also sets forth, with even greater specificity than the Board's Rules and Regulations, the provision that the determinations of the regional director are to be final and binding. The agreement signed by respondent in this case provided that "the determination of the Regional Director shall be final and binding upon any question, including ques-

tions as to the eligibility of voters, raised by any party hereto relating in any manner to the election" (R. 37, 104).

If the lengthier procedure is to be dispensed with and the advantages of a speedy determination are to be preserved, it is essential that the parties abide by their agreement to accept as final and binding the rulings of the regional director and to refrain from seeking a redetermination of the issues by the Board itself. Were the Board to sanction violations of the consent election agreements, not only would the value of this procedure be lost but a premium would be placed upon the parties' failure to abide by their commitments, and an atmosphere of uncertainty and suspicion, hostile to the success of future bargaining efforts between the parties, would be created. The Board has therefore consistently held, as it did in the instant case, that it "will not disturb the rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" (R. 11).[38] The Board has further stated that[39]

[38] For other cases in which the Board has applied this rule, see *Matter of Aetna Firebrick Co.*, 56 N. L. R. B. 849, 853–854; *Matter of Kellogg Switchboard and Supply Co.*, 28 N. L. R. B. 847, 852; *Matter of O. U. Hofmann*, 55 N. L. R. B. 683, 684, enforced, 147 F. 2d 679 (C. C. A. 3); *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156, 159, enforced, 140 F. 2d 754, 758 (C. C. A. 6), certiorari denied, 322 U. S. 763.

[39] The *Capitol Greyhound* case, 49 N. L. R. B. at 159.

> * * * we feel ourself bound by the terms of the agreement providing for the finality and binding effect of the Regional Director's determination to the same extent as a court is bound by an agreement to abide by an arbitrator's award. To hold otherwise would permit an employer deliberately to ignore binding commitments embodied in a consent agreement; would open the door to subterfuges for hampering and delaying a final determination of a bargaining representative; and would tend to defeat, rather than to effectuate, the policies of the Act.

This rationalization of the Board, as well as the practice itself, received express judicial approval in *National Labor Relations Board* v. *Capitol Greyhound Lines*, 140 F. 2d 754 (C. C. A. 6), certiorari denied, 322 U. S. 763. The facts in that case were identical with the facts in the instant case except that the employee Nolan, whose vote, if cast for the union, was determinative of the election in that case, had been hired for the first time subsequent to the eligibility date. The employer had apparently inadvertently supplied the regional director with the pay roll for a period subsequent to the eligibility date. The Board held that the regional director's ruling barring the employer's post-election challenge was correct and neither arbitrary nor capricious, although Nolan was in fact not eligible to vote (49 N. L. R. B. 156, 158–159). The circuit court of

appeals enforced the Board's order, quoting with approval the paragraphs of the Board's decision in which the Board explained why it regarded the regional director's ruling as neither arbitrary nor capricious (140 F. 2d at 758) and pointing out that the Board's action was entirely within the broad discretion committed to it by Congress in the matter of determining bargaining agents (140 F. 2d at 759).

The Board's consent election procedure is also fully supported by the many cases in this and other courts which hold that parties to a contract may agree in advance to submit broad categories of questions to a designated person and that his decision, once arrived at, is final and binding unless fraudulent or arbitrary and capricious.[40] In the light of these decisions, we think it plain that the Board's regulations may validly provide for

[40] *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *Plumley* v. *United States*, 226 U. S. 545; *Martinsburg & Potomac R. Co.* v. *March*, 114 U. S. 549; *Memphis Trust Co.* v. *Brown-Ketchum Iron Works*, 166 Fed. 398, 403–404 (C. C. A. 6), certiorari denied, 214 U. S. 515; *Kihlberg* v. *United States*, 97 U. S. 398, 401; *United States* v. *Gleason*, 175 U. S. 588, 602, 606–607; *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 278; *Minton* v. *F. G. Smith Piano Co.*, 36 App. D. C. 137; *United States* v. *Cooke*, 207 Fed. 682, 685 (E. D. Wash.); *The Hartbridge*, 62 F. 2d 72 (C. C. A. 2), certiorari denied, 288 U. S. 601; *Richardson & Sons* v. *Hedger Transportation Corp.*, 98 F. 2d 55, 57 (C. C. A. 2); *Wilkins* v. *Allen*, 169 N. Y. 494, 62 N. E. 575, 576–577; *Pendleton* v. *Pace*, 9 S. W. 2d 437 (Tex.).

an agreement which leaves procedural as well as fact questions relating to the election to the regional director, and that such an agreement, once made, is binding in all respects. In this case the issues raised by the employer's challenge were submitted to the regional director and determined by him. Under any view, therefore, his decision should be given effect unless arbitrary or capricious.

B. *The regional director's ruling was neither arbitrary nor capricious.*—The Board's finding that the regional director's ruling rejecting respondent's challenge to Mrs. Kane's eligibility is neither arbitrary nor capricious is sustained by all of the reasoning which supports the validity of the rule excluding post-election challenges to the eligibility of voters (see *supra*, pp. 27–54). But quite apart from the validity of this rule, the circumstances of this case, as found by the Board,[41] warrant its findings upholding the finality of the regional director's ruling.

Respondent, fully aware of the requirements for voting, placed Kane's name on the eligibility list which it submitted to the regional director on May 1, 1944 (R. 12, 19; R. 37, 103, 111).[42] This list

[41] It should be noted that all of the findings of the trial examiner, made in his intermediate report (R. 18–28), were adopted by the Board as its own findings (R. 11).

[42] In the following description of the circumstances upon which the Board relied, the references preceding the semicolon are to the Board's findings and the succeeding references are to supporting evidence.

was furnished by respondent as a complete list of its employees in the appropriate unit on its pay roll for April 21, 1944 (R. 12, 19; R. 37, 110).[43] Mrs. Kane, a stitcher whose classification falls within the appropriate unit, was marked upon the list of eligible voters submitted by respondent as "out sick" (R. 19; R. 41, 58). Mrs. Kane, who last worked at the respondent's plant on March 24, 1944, had sent her forelady a note on March 31, 1944, stating that she had not been to work the preceding week because she had been sick and asking that her pay be given to the bearer of the note (R. 20; R. 57, 65–67, 69, 113). Respondent has never set a time limit as to how long an employee may be absent from work because of illness before being separated from the pay roll (R. 25; R. 78). In some cases employees remain on the pay roll although they are away from work "a good many months" because of illness (R. 25; R. 78–79). Mrs. Kane's name was not taken off the respondent's pay roll until some time after May 8, 1944 (R. 25; R. 69–70). It was not until the early part of July, when she returned to the plant to see if there was lighter work available for her, that Mrs. Kane was first informed that her name was no longer on the pay roll (R. 25; R. 72). There

[43] The employees on the pay roll of April 21 were paid on that day for work performed from April 7 to April 14, as it is the respondent's practice to pay its employees one week after the termination of the work period for which payment is made (R. 19; R. 55).

is no evidence that Mrs. Kane has worked anywhere else since March, 1944 (R. 25; R. 74).

Mrs. Kane appeared at the polling place on May 5, 1944, and cast an unchallenged ballot (R. 20; R. 37, 110–111). At the election, the respondent was duly represented by two observers who had been informed of their rights and duties with respect to such matters as the challenging of the ballot of any person not qualified to vote (R. 20; R. 37, 110–111). One of the respondent's observers, a clerk in the factory office, regularly received records in the course of her duties by which she would have known whether any given employee, such as Mrs. Kane, had actually worked during any given week (R. 20; R. 72–73). The company observers at the polls where Mrs. Kane voted attested that the balloting was fair, that all eligible voters were given an opportunity to vote and that there were 230 valid votes (which number included Mrs. Kane's vote) (R. 20; R. 37, 106–108, 111). It was not until four days after the election that respondent raised any challenge to Mrs. Kane's participation in the election although respondent had notice of all the facts upon which its challenge was based several days before the election (R. 20; R. 37, 80, 110–111, 114–115).[*] These circum-

[*] Respondent's contention that it did not know these facts until they came to the attention of its superintendent on May 8 is based on a misapprehension as to applicable law. Since respondent is a corporation, both the regional director (R. 37, 110–111) and the Board (R. 12) properly treated the receipt by the mailing clerk of the notice from

stances, it is submitted, place respondent in default; and the regional director, as the Board found (R. 11–12), reasonably so ruled (R. 37, 111).

The facts upon which the Board relied in holding that the regional director's refusal to consider the post-election challenge was neither arbitrary nor capricious, are very similar to those set forth in the portions of the Board's decision in the *Capitol Greyhound* case, which the Circuit Court of Appeals for the Sixth Circuit quoted with approval (140 F. 2d at 758):

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the Massachusetts Division of Employment Security as notice to respondent. This notice was postmarked May 1, 1944 (R. 27; R. 60). In the normal course of business, it would have been received on May 2, 1944 (R. 27; R. 68). It was the duty of the mail clerk to place this notice on the superintendent's desk as soon as she opened the letter (R. 27; R. 68–69). While the superintendent testified that he did not see it until Monday, May 8, 1944 (R. 27; R. 59–60, 68), he admits that he found it in the proper file as soon as he looked for it (R. 27; R. 59–60). Nor does respondent deny that the notice must have been received prior to the election which was held at the close of work on Friday, May 5, 1944, the last work day preceding Monday, May 8, 1944 (R. 23, 27; R. 41, 59, 68). The law is well settled that a notice mailed to a corporation but opened by a mail clerk is notice to the corporation even though it is improperly filed and never comes to the attention of the appropriate officers. *Hand & Johnson Tug Line* v. *Capada S. S. Lines, Ltd.*, 281 Fed. 779 (C. C. A. 6); *Pellon* v. *Conn. Gen. Life Ins. Co.*, 105 Vt. 508, 168 Atl. 701; *Palmer* v. *New York Herald Co.*, 228 App. Div. 176, 239 N. Y. S. 619; *Twombley* v. *Framingham Gas, Fuel & Power Co.*, 248 Mass. 53, 142 N. E. 828.

In overruling the respondents' objection, the Regional Director had before him and considered the following facts. The list of eligible voters attached to the agreement was prepared solely by the respondents, was submitted by them at the time of the execution of the agreement, and, by the terms of the agreement, was the sole and exclusive list of eligible voters. Whether or not Nolan was employed by the respondents on the agreed eligibility date of July 31, was a fact peculiarly within the respondents' knowledge. Yet, not until the respondents were informed of the outcome of the election did they raise any objection to Nolan's vote. Only 2 months after the election, Graves, the respondents' vice president and general manager, who signed the agreement to which the eligibility list containing Nolan's name was attached, was unable to state that he had no knowledge prior to the election that Nolan's name was erroneously placed on the eligibility list. The respondents offered no evidence to show that Nolan voted for the Union.

Upon these facts, we find that the Regional Director's ruling was neither arbitrary nor capricious.

The court below, in its opinion, asserts a distinction between the facts of the Capitol Greyhound case and those in this case on the ground that there the ineligible voter was an employee at the time of the election, whereas here Mrs. Kane may

not have been (R. 122). It seems clear, however, that once the eligibility rules for an election are fixed, the number of days by which the voter misses the qualifying pay-roll period and the time relation of those days to the eligibility date, are immaterial. A voter is either eligible or ineligible. Just as Nolan would have been eligible had the consent election agreement provided a later eligibility date, so would Mrs. Kane have been eligible if the consent election agreement had provided that the election be held a month earlier. No difference in legal principle can be made to turn upon such distinctions.

Respondent contends that the regional director's ruling was arbitrary "as a matter of law"[61] in that, by permitting the vote of a non-employee to determine the results of the election, it violated the terms of both the Act and the consent election

[61] Respondent's contention, made in its brief before the Board, that "no matter how painstaking a tribunal may be, its decision is as a matter of law arbitrary and capricious if it disregards or violates clear principles of law" is clearly without merit. As has been held in numerous cases involving agreements to arbitrate similar to the consent election agreement in this case, where the parties have agreed beforehand to abide by a decision, it will not be overturned in the absence of fraud or bad faith, though it be based upon an erroneous construction of the law. *Kihlberg* v. *United States*, 97 U. S. 398, 401; *United States* v. *Cooke*, 207 Fed. 682, 685 (E. D. Wash.); *Richardson & Sons* v. *Hedger Transportation Corp.*, 98 F. 2d 55, 57 (C. C. A. 2); *The Hartbridge*, 62 F. 2d 72 (C. C. A. 2), certorari denied, 288 U. S. 601; *Wilkins* v. *Allen*, 169 N. Y. 494, 62 N. E. 575, 576–577.

agreement which provide that the exclusive representative shall be chosen by a majority of the employees (R. 39–40, 45–46, 47). But the regional director made no finding as to how Mrs. Kane voted or whether or not Mrs. Kane was an employee of the respondent at the time of the election. The Report on Objections did not resolve the first point. And the Board ruled that the statement submitted by respondent to prove that Mrs. Kane voted for the Union could not be accepted as evidence (R. 12). On the second point, the Report on Objections by the regional director refers to Kane's employment status as "not quite clear" (R. 37, 111). Indeed, the trial examiner's finding on this point, which was adopted by the Board, is as follows (R. 25):[62]

> * * * while the evidence appears to afford ample basis for a finding that, at the time she voted, Kane was an employee who was not working because she was ill; it is equally apparent, on the one hand, that the Regional Director's less positive finding, as to Kane's status was neither arbitrary nor capricious and, on the other hand, that the evidence does not warrant a finding in line with respondent's contention that Kane was no longer its employee when she voted on May 5, 1944.

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[62] One member of the Board, concurring in the result reached by the majority, found from the evidence that Mrs. Kane was in fact an employee at the time she cast her ballot (R. 15).

The Board itself dealt with the issue of whether its action amounted to a ruling that elections could be decided on the ballot of a non-employee by stating (R. 11–12):

> 3. The respondent further contends that the right to challenge a voter on the ground that he is a non-employee cannot be waived as a matter of law. The Respondent reasons that since it would not be valid for the respondent in advance to agree with the Regional Director to permit non-employees to vote, the respondent cannot do so by waiver. Here again we believe that the respondent has misconceived the issue. Were the Regional Director knowingly to agree in advance to permit non-employees to vote, we might well hold his action to be arbitrary and capricious, but that is not the issue in this case. Here we are confronted solely with the question of whether the respondent, after certifying Kane as an eligible employee voter and permitting her to vote without challenge although facts which it now asserts rendered her ineligible were then in its possession should be permitted to attack her status as a voter after the results of the election have been announced. The Regional Director's ruling that under the circumstances the respondent's claim could not be considered at that stage, is not arbitrary or capricious as a matter of law, but, as stated in the Inter-

mediate Report, is in complete accord with the established principles and policy of the Board.

Respondent further contends (Br. in Opp., pp. 3–4) that its challenge of Kane's vote four days after the election was timely because the consent election agreement provided that "objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots" (R. 37, 105). In so contending, respondent overlooks the distinction between "challenges" and "objections" which is clearly made not only in the consent election agreement itself but also by the Board's Rules and Regulations and the customary procedures and practices of the Board, which the consent election agreement provides shall govern the manner of holding the election (R. 37, 104). The consent election agreement indicates that challenges to the eligibility of voters are to be made at the polls, for it expressly provides that "each party will be allowed to station an equal number of authorized observers, * * * at the polling places during the elections * * * to challenge the eligibility of voters" (R. 37, 105). The heading of the paragraph dealing with reports on objections and challenges by its wording "Objections, Challenges, Reports Thereon" shows that objections and

challenges are regarded as distinct. This paragraph likewise makes provision for one report on objections and another, separate, report on challenges. Moreover, the consent election agreement does not provide that any party has five days after the tally for filing objections pertaining to any matter involved in the holding of the election. The language is much narrower. It speaks of "Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof."

The Board's Rules and Regulations also speak of "challenges" and "Objections" as separate and distinct categories (Article III, Section 10, *infra*, pp. 79–81). They give the parties five days within which to file "Objections to the conduct of the election or conduct affecting the results of the election". They transfer the case to the Board "if no such Objections are filed within five days" and "if the challenged ballots are insufficient in number to affect the result of the election". If such objections are filed, the Regional Director is required to prepare a "Report on Objections". If there are such challenged ballots, he is required to prepare a "Report on Challenged Ballots".

The Board, in rejecting respondent's contention that the provisions of the consent agreement en-

titled it to question Mrs. Kane's status by an objection filed within five days, stated (R. 11):

> The respondent has misconceived the purpose of this provision which is identical with that appearing in the Board's Rules and Regulations. The objections referred to in this provision relate to the conduct of the election and not to the eligibility of the persons who vote. An objection to the conduct of an election, if sustained, voids the results of the election; while a challenge, if sustained, merely eliminates the objectionable ballot.

The Board has uniformly followed the "policy of differentiating between objections to the conduct of an election and challenges to the eligibility of voters and it does not ordinarily permit challenges under the guise of objections after the election".[63] The term "challenge" is a word of art in the field of elections. It usually connotes a confrontation of the prospective voter at the time he applies for a ballot.[64] In most states, provi-

[63] *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512. See also *Matter of Owens-Corning Fiberglas Corp.*, 61 N. L. R. B. 546, 551–552; *Matter of Kellogg Switchboard and Supply Co.*, 28 N. L. R. B. 847, 852; *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156, 158–159; *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739–740.

[64] See the description of the manner in which a challenge is to be made in the following statutes: Alabama Code 1940, Title 17, Secs. 187–190; California, Deering's Elections Code, Secs. 5620–5631; Colorado Stat. Ann. 1935, c. 59, Sec. 228; Connecticut Rev. Stat. 1930, Sec. 602; Florida Stat. Ann., Sec. 102.42; Ga. Code Ann., Sec. 34–805; Idaho Code Ann.

sion is made to have someone present at the election who rules on the challenge then and there, and the voter is turned away or permitted to cast his ballot according to the decision made. In a few states, provision is made for the segregating or marking of the identity of the ballot.[65] But in all, a challenge is something quite different from an objection to the election.

Moreover, the regional director ruled that even if respondent's challenge to Mrs. Kane's eligibil-

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1932, Secs. 33–916, 33–924; Kentucky Rev. Stat. 1944, Secs. 118.240–118.260; Louisiana, Dart's Gen. Stat., 1939 Ann., Sec. 2741; Maine Rev. Stat. 1944, c. 5, Sec. 38; Maryland Ann. Code 1939, Article 33, Secs. 57, 106; Michigan Comp. Laws 1929, Sec. 3122; Masons Minn. Stat. 1927, Sec. 425; Mississippi Code Ann. 1942, Sec. 3129; Montana Rev. Code 1935 Ann., Sec. 573; Nevada Comp. Laws 1929, Sec. 2449; New Hampshire Rev. Laws 1942, c. 41, Sec. 16; New Jersey Rev. Stat, 1937, Secs. 19:15–18, 19:15–34; New Mexico Stat. 1941 Ann., Sec. 56–314; New York-McKinney's Consol. Laws Ann., Elections, Secs. 361–364; North Dakota Rev. Code 1943, Sec. 16–1214; Throckmorton's Ohio Code Ann. 1940, Secs. 4785–82, 4785–129; Oklahoma Stat. 1941, Title 26, Secs. 63, 256; Oregon Comp. Laws Ann., Secs. 81–111, 81–1605; Purdon's Pa. Stat. Ann., Title 25, Sec. 3050; South Dakota Code 1939, Secs. 16.0225, 16.1207; Williams Tenn. Code Ann. 1934, Sec. 2078; Vernon's Civil Statutes of Texas, Ann., Art. 3006; Utah Code Ann. 1943, Secs. 25–3–35, 25–6–18; Remington's Revised Washington Stat. Ann., Sec. 5325; West Virginia Code 1943, c. 3, Art. 4, Sec. 80 (1); Wisconsin Stat. 1945, Sec. 6.50.

[65] See the following statutes which provide that, upon the challenge of a voter, his ballot is to be marked so it can later be identified should the voter be ruled unqualified: Michigan Comp. Laws 1929, Sec. 3122; West Virginia Code 1943, c. 3, Art. 4, Sec. 80 (2); Wisconsin Statutes 1945, Sec. 6.52.

ity were considered as an objection, respondent had nevertheless waived it (R. 37, 111). The Board ruled that, treating the challenge as an objection, his rejection thereof was neither arbitrary nor capricious (R. 11). There are many situations in which objections to elections may be waived by the failure to raise them promptly. The provision for five days is intended to foreclose any objections however serious which may come to light beyond that time; it does not purport to establish a rule which would safeguard a party who, discovering objections before an election has been held, hides the facts in the hope that if the election turns out badly, he could use the objection as an "ace in the hole." Nor does it protect him in carelessness about discovering facts he should reasonably have determined before the election. Such conduct in this field of the law as in others necessarily creates an estoppel. The Board has repeatedly urged all parties to be vigilant in bringing forward any matters which might prevent a fair election instead of taking their chances on the result of the election and upon losing, seeking to set aside the election.[66] Of course, if the facts, though brought to the

[66] See, for example, *Matter of Cudahy Packing Co.*, 4 N. L. R. B. 39, 41; *Matter of Solvay Process Co.*, 37 N. L. R. B. 983, 984; *Matter of Moulton Ladder Mfg. Co.*, 27 N. L. R. B. 40, 46; *Matter of Kilburn Mills*, 48 N. L. R. B. 1252; *Matter of Patent Button Co.*, 65 N. L. R. B. No. 51; *Matter of Lamar Cotton Oil Co.*, 67 N. L. R. B. No. 188.

Board's attention for the first time after the election, show that the employees were under the influence of the employer's unfair labor practices when they voted or were not all advised that the election was to take place, the Board usually sets aside the election irrespective of any estoppel principles. But here there was no such situation presented. The issue relates solely to the vote of one employee. In the instant case the respondent was, to say the least, careless about Kane's status as an employee. The Board pointed out that (R. 11):

> Insofar as the respondents' objection may be said to concern the conduct of the election, the Regional Director considered and disposed of it on the ground that the respondent was in no position to be heard thereon.

CONCLUSION

Respondent conceededly refused to bargain collectively with the Union. Its only defense was based upon the fact that the regional director's determination of majority was based on an election in which Mrs. Kane voted. His determination was in accord with Board policy, which, we submit, was valid. And irrespective of Board policy, his determination was binding on respondent under the terms of the consent election agreement. For these reasons, we respectfully submit that the respondent committed an unfair labor

practice by its refusal to bargain, and that the decree below should be reversed with directions to enforce the Board's order in full.

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SEPTEMBER 1946.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 6. The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect

to rates of pay, wages, hours of employment, or other conditions of employment; *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleading, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

The pertinent provisions of the Rules and Regulations of the National Labor Relations Board (Series 3, effective November 26, 1943) are as follows:

ARTICLE III

PROCEDURE UNDER SECTION 9 (C) OF THE ACT FOR THE INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES

SEC. 1. *Who may file; where to file; withdrawal of petition; form; jurat.*—A petition to investigate and certify under Section 9 (c) of the Act the name or names of representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of employees, or by an employer. * * *

SEC. 3. *Same; investigation by Regional Director; definition of parties; Notice of Hearing; service of notice; withdrawal of notice.*—After a petition has been filed, if it appears to the Regional Director that an investigation should be instituted he shall institute such investigation by issuing a Notice of Hearing, * * *

SEC. 6. *Conduct of hearing.*—The hearing upon the question of representation shall be conducted by a Trial Examiner designated by the Board or the Chief Trial Examiner, and shall be open to the public unless otherwise ordered by the Trial Examiner. * * *

SEC. 8. *Record; what constitutes; transmission to Board.*—Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, Notice of Hearing, motions,

rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 9. *Proceeding before Board; briefs; further hearing; Direction of Election; Certification of Representatives.*—The Board shall thereupon proceed, either forthwith upon the record; or after oral argument or the submission of briefs, or after further hearing, as it may determine, to direct a secret ballot of the employees in order to complete the investigation, or to certify to the parties the name or names of the representatives that have been designated or selected, or to make other disposition of the matter. * * *

SEC. 10. *Election procedure; Tally of the Ballots; Objections; Report on Challenged Ballots; Report on Objections; Exceptions; action of Board; hearing; contents of record.*—Where the Board determines that a secret ballot should be taken, it shall direct an election to be conducted under the supervision of a designated agent upon such terms as it may specify. Upon the conclusion of such election, the designated agent shall cause to be furnished to the parties a Tally of the Ballots. Within five (5) days thereafter, the parties may file with the designated agent an original and three copies of Objections to the conduct of the election or conduct affecting the results of the election. Copies thereof shall be served upon each of the other parties by the party filing such Objections.

If no such Objections are filed within five (5) days after the conclusions of the election, and if the challenged ballots are insufficient in number to affect the result of the election, the designated agent shall

forthwith forward to the Board in Washington, D. C., the Tally of the Ballots which, together with the record previously made, shall constitute the record in the case, and the Board may thereupon decide the matter forthwith upon the record, or may make other disposition of the case.

If Objections are filed to the conduct of the election or conduct affecting the results of the election or if the challenged ballots are sufficient in number to affect the result, the designated agent shall investigate the issues raised by such Objections, challenges, or both, and shall prepare and serve upon the parties a Report on the Challenged Ballots, Objections, or both, including his recommendations, which report, together with the Tally of the Ballots, he shall forward to the Board in Washington, D. C. Within five (5) days from the date of the Report on Challenged Ballots, Objections, or both, the parties may file with the Board in Washington, D. C., an original and three copies of Exceptions to such report. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the designated agent. If no Exceptions are filed to such report the Board, upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record, or may make other disposition of the case.

The Report on Challenged Ballots shall consolidated with the Report on Objections in appropriate cases.

If Exceptions are duly filed, either to the Report on Challenged Ballots, Objections, or both if it be a consolidated report, or to

conduct affecting the results of the election and it appears to the Board that such Exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such Exceptions raise substantial and material issues, the Board may direct the designated agent or other agent of the Board to issue, and cause to be served upon the parties, a Notice of Hearing on said Exceptions before a Trial Examiner, designated by the Board or the Chief Trial Examiner. The hearing shall be conducted in accordance with the provisions of Sections 5, 6, and 7 of this Article, insofar as applicable. Upon the close of the hearing, the agent conducting the hearing shall forward to the Board in Washington, D. C., the Notice of Hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, Exceptions, documentary evidence, all of which, together with the Objections to the conduct of the election or conduct affecting the results of the election, the Report on such Objections, the Report on Challenged Ballots, and Exceptions to the Report on Objections or to the Report on Challenged Ballots, and the record previously made, shall constitute the record in the case. The Board shall thereupon proceed pursuant to Section 9 of this Article.

SEC. 12. *Hearing waived by stipulation; consent election agreements; consent cross-check agreements.* * * *

After a petition has been filed and it appears to the Regional Director that an investigation should be instituted, the part-

ties and any known individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into a consent election agreement or consent cross-check agreement leading to a statement by the Regional Director of the facts ascertained after such consent election or cross check but not resulting in a certification by the Board under Section 9 (c) of the Act. Such agreement shall include a determination of the appropriate unit, the time and place of holding the election, and the pay roll to be used in determining what employees within the appropriate unit shall be eligible to vote or to be counted. Such consent election or consent cross check shall be conducted under the direction and supervision of the Regional Director.

The method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections directed by the Board, pursuant to Section 9, Article III, of these Rules and Regulations, except that the rulings of the Regional Director shall be final, and the statement by the Regional Director of the results thereof shall be final. The method of conducting such consent cross check shall be set forth in the consent cross-check agreement. The rulings of the Regional Director on all matters shall be final, and the statement by the Regional Director of the results thereof shall be final.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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No. 60

In the Supreme Court of the United States

OCTOBER TERM, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INDEX

	Page
I. The Board had "jurisdiction" to issue the order here in question	7
II. The Board's finding in the instant case that the union represented a majority of respondent's employees in an appropriate bargaining unit was reached in accordance with the procedural requirements of the Act	9
III. None of the actions of the Board or any of its agents in the instant case constituted an abuse of discretion	15
IV. The Board is not relying in this court on any ground not stated in its decision	24

CITATIONS

Cases:

Allis Chalmers Manufacturing Co., Matter of, 70 N. L. R. B. 348, 18 L. R. R. M. 1353	6
Carroll, William H., Matter of, 29 N. L. R. B. 343	12
Central Missouri Telephone Co., Matter of, 15 N. L. R. B. 798	12
Chrysler Corp., Matter of, 63 N. L. R. B. 866	21
Gluck Bros., Inc., Matter of, 52 N. L. R. B. 1144	23
May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376	16
National Labor Relations Board v. *Appalachian Electric Power Co.*, 140 F. 2d 217	4
National Labor Relations Board v. *Botany Worsted Mills, Inc.*, 133 F. 2d 876, certiorari denied, 319 U. S. 751	4
National Labor Relations Board v. *William H. Carroll*, 120 F. 2d 457, enforcing 29 N. L. R. B. 343	10, 12
National Labor Relations Board v. *Central Missouri Telephone Co.*, 115 F. 2d 563, enforcing 15 N. L. R. B. 798	10, 12
National Labor Relations Board v. *Century Oxford Manufacturing Corp.*, 140 F. 2d 541, certiorari denied, 323 U. S. 714	4
National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453	16
National Labor Relations Board v. *Fickett-Brown Manufacturing Co.*, 140 F. 2d 883, enforcing 52 N. L. R. B. 32	10
National Labor Relations Board v. *Gerling Furniture Mfg. Co.*, 103 F. 2d 663	10

722137—46——1

Cases—Continued Page

National Labor Relations Board v. *J. L. Hudson Co.*, 135 F. 2d 380, certiorari denied, 320 U. S. 740 ..... 9, 10, 11

National Labor Relations Board v. *Henry Levaur, Inc.*, 115 F. 2d 105, enforcing 17 N. L. R. B. 1034, certiorari denied, 312 U. S. 682 ..... 10, 12

National Labor Relations Board v. *National Mineral Co.*, 134 F. 2d 424, certiorari denied, 320 U. S. 753 14

National Labor Relations Board v. *Pure Oil Co.*, 103 F. 2d 497, enforcing 6 N. L. R. B. 818 ..... 10, 13

National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206 16

National Labor Relations Board v. *West Kentucky Coal Co.*, 152 F. 2d 198, certiorari denied, No. 1198, October Term, 1945 6

National Labor Relations Board v. *Whittier Mills Co.*, 111 F. 2d 474 ..... 4, 14

Norris, Inc., Matter of, 63 N. L. R. B. 502 21

Pittsburgh Plate Glass Co., Matter of, 8 N. L. R. B. 1210, enforced, 102 F. 2d 1004 14

Pittsburgh Plate Glass Co. v. *National Labor Relations Board*, 313 U. S. 146 ..... 6, 9, 14, 15

Pure Oil Co., Matter of, 6 N. L. R. B. 818 13

Southern Steamship Co. v. *National Labor Relations Board*, 316 U. S. 31 16

Sun Ship Employees Ass'n v. *National Labor Relations Board*, 139 F. 2d 744 17

Valley Mould & Iron Corp. v. *National Labor Relations Board*, 116 F. 2d 760, certiorari denied, 313 U. S. 590 4

Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515 ..... 2, 3, 13

Walker Vehicle Co., Matter of, 7 N. L. R. B. 827 18

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):

Sec. 9 ..... 7, 8, 22

Miscellaneous:

National Labor Relations Board Rules and Regulations ... 17, 24

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 60

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I

THE BOARD HAD "JURISDICTION" TO ISSUE THE ORDER HERE IN QUESTION

Respondent rests its case largely on the theory that before the Board can find that an employer has unlawfully refused to bargain with a duly selected representative of the employees in an appropriate bargaining unit, it must find that the representative has been chosen in literal compliance with the statutory phrase, "by a majority of the employees in the unit" and that the union in this case was not so chosen (Resp. Br., pp. 6,

7, 10, 12, 13, 24–25, 42, 43). In advancing this theory, respondent ignores or evades both its necessary corollaries and the fact that it has already been rejected by this Court and by several of the circuit courts of appeals.

A. As noted in our main brief (pp. 27–29), this Court has already held that the statutory requirement of a choice by a "majority * * * of employees" in the Railway Labor Act need not be read so literally as to require rejection of the results of an election in which a majority of those voting, though less than a majority of the employees affected, made an effective choice. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 559–561. The same rule has been applied under the National Labor Relations Act by every circuit court of appeals which has passed on the subject (Bd. Br., p. 28, n. 7), and respondent does not question this doctrine. These cases, without more, refute Point I of respondent's argument, which is that "The Board is without jurisdiction to find the respondent guilty of an unfair labor practice unless the employer has refused to bargain with a representative chosen by a majority of the employees in the unit" (Resp. Br., p. 7).

Respondent attempts to distinguish the *Virginian Railway* case on the ground that while the words of the statute need not be applied literally where the asserted defect is the absence of an affirmative designation of the union by a majority

of the affected employees, it must be read literally, and as creating a "jurisdictional" requirement, where the asserted defect is that one of the voters may have been ineligible to vote (Resp. Br., pp. 25–26). This Court's decision in the *Virginian Railway* case was not so narrow. It rested on the theory that the provision in the Railway Labor Act for ascertaining the choice of the majority must be analogized to political elections (300 U. S. at p. 560). If the same analogy is made to the facts in this case, there can be no doubt as to the outcome. See Bd. Br., pp. 48–49.

The weakness of respondent's extreme position may be seen in the fact that it leads it to assert that "A certification once made is always subject and open to the attack that the bargaining agent has lost its majority status" (Resp. Br., p. 32). This theory has been uniformly rejected by the circuit courts of appeals. They have held rather that the Board may adopt reasonable rules respecting the duration of the validity of its certifications, such as that they cannot be called into question for a year or other reasonable period after issuance, in the absence of special circumstances; accordingly, they have held that the Board has jurisdiction, consistently with such rules, to find that an employer has illegally refused to bargain with a duly certified union, even where it is alleged that the union has lost its majority shortly after the certification and prior to the employer's refusal to bargain with it or the

occurrence of any other unfair labor practices. *National Labor Relations Board* v. *Century Oxford Manufacturing Corp.*, 140 F. 2d 541, 542–543 (C. C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881–882 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 220–222 (C. C. A. 4); *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474, 478 (C. C. A. 5). See also *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. 2d 760, 764–765 (C. C. A. 7), certiorari denied, 313 U. S. 590.[1]

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[1] In the *Whittier Mills* case, the Circuit Court of Appeals for the Fifth Circuit said (111 F. 2d at p. 478; italics supplied):

"The employer is, in theory at least, not much concerned, since the employees are to choose their representative unhindered. *So long as the employees make no contention that they are not correctly represented, it would seem that the employer could safely continue to deal indefinitely with the designated bargaining agent.* In the present case the employees have not protested at all, and the employer has raised the question belatedly. Assuming the question duly raised, the Board decided it adversely. *There is no certain evidence that a majority of the present employees do not now desire representation by the Committee.* Many persons who were employees a year and a half ago had ceased to be, but it cannot be assumed that all of these were either assenters to or dissenters from the selection of the Committee. On the other hand the newly signed union cards do not prove a gain in assents, for the signers may have voted originally for the Committee. The present wishes of a majority of the employees are not established either way."

B. Respondent asserts that a finding of majority choice cannot be established by waiver or estoppel (Br., pp. 10, 15). Carried to its logical extreme, its contention would mean that after the Board had held an election, issued a certification, issued a complaint, held a hearing, rendered a decision, and petitioned a circuit court of appeals for enforcement, and perhaps even after the court had issued a decree of enforcement, the employer could still raise for the first time the issue whether individuals who voted in the election were not in fact employees. Respondent, of course, makes no such claim, and it would no doubt concede that its right to raise new issues expired at some point in these proceedings. But if any term may be placed on the right of parties to raise new issues, it cannot be said that its exclusion after any particular point creates either a "fiction" (Resp. Br., p. 15) or a jurisdictional defect. Hence the sole question in this case is whether the Board placed a reasonable limit on the right to raise the issue of eligibility. For the reasons stated in our main brief, we believe that it did.

Respondent further argues that Congress, by providing judicial review only after the Board had conducted an unfair labor practice proceeding, must have intended that questions of this kind could be raised as late as the hearing in an unfair labor practice proceeding based on a prior certification, and, therefore, could not have re-

quired that eligibility issues be raised before a ballot is cast (Resp. Br., pp. 24, 31–32). This Court has already held that the Board may refuse to try in an unfair labor practice proceeding issues which were or could have been tried in a prior representation proceeding. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, 158–161. The principle thus laid down was recently applied by the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *West Kentucky Coal Co.,* 152 F. 2d 198, 200–201, certiorari denied, No. 1198, October Term, 1945.[2] The necessity for this rule is clear. As the Board has recently held (*Matter of Allis Chalmers Manufacturing Co.,* 70 N. L. R. B. 348, decided August 26, 1946, 18 L. R. R. M. 1353):

> Considerations of public policy require that when the Board's authority is invoked for the determination of an appropriate bargaining unit, it be provided with all the facts necessary to an informed and intelligent discharge of its responsibilities. * * * To permit successive opportunity to adduce unit evidence would tend to render representation proceedings meaningless, encourage the withholding of evidence, and invite parties to ignore representation hearings altogether.

[2] These cases dispose of respondent's contention that the unfair labor practice proceeding was "the earliest time at which the respondent could raise the question in such way as to obtain Court review" (Resp. Br., p. 24; see also p. 32).

In the preceding cases the evidence offered was addressed to the question of the appropriate bargaining unit. The decisions, however, make it clear that the postponement of judicial review of the representation issues until after the unfair labor practice proceeding does not prevent the Board from treating the failure to raise an issue at the appropriate stage of the representation proceedings as barring any future raising of the issue. Moreover unit questions are just as much and just as little a matter of jurisdiction as questions of employee status. The Board here expressly noted that cases involving post-election challenges, based on the claim that voters were not within the appropriate unit, are indistinguishable from the case at bar (R. 12, note 3).[3] Section 9 (a) of the Act requires that the exclusive bargaining representative be chosen by a majority "of the employees *in a unit appropriate*" for collective bargaining (italics supplied). This language im-

[3] Former Board Member Reilly has suggested a distinction on the ground that the Board has "broad discretion" in determining bargaining units (Resp. Br., pp. 15–16). However, the Board has just as much discretion in determining which individuals are employees for the purpose of selecting the bargaining agent. As shown in our main brief (p. 34, n. 12), there are many cases which require full exercise of the Board's administrative expertise to determine the scope of the electoral body. Congress certainly did not intend that, in such cases, parties could raise questions concerning each of the voters in the election at any time after the election was conducted.

722137—46——2

poses as much of a jurisdictional requirement as does the provision requiring choice "by the majority of the employees in a unit". Under the respondent's theory, consequently, the cases cited *supra*, p. 6, were incorrectly decided.

C. Respondent insists that it is not necessary in this case to decide whether the rule which it urges would open the door to such abuses as deliberately holding back known challenges until after an election, and making such challenges, either previously known or newly discovered, long after the election (Resp. Br., pp. 18, 30, 31). Respondent does argue that, at least in the hearing in the unfair labor practice proceeding, and perhaps later, any party would be free to raise these and other issues, such as whether the unit previously found by the Board was appropriate, and whether employees who voted in the election were in fact within the unit, as well as any of the other issues which the Board must pass on before issuing a certification (Br., p. 32). Any party would be free, furthermore, to withhold evidence on these issues deliberately and with the intention of rendering the Board's certifications defective. But there is nothing in the statute which requires the conclusion that Congress intended to make the formal representation proceeding which it provided for in Section 9 (c) of the Act so meaningless.

II

THE BOARD'S FINDING IN THE INSTANT CASE THAT THE UNION REPRESENTED A MAJORITY OF RESPONDENT'S EMPLOYEES IN AN APPROPRIATE BARGAINING UNIT WAS REACHED IN ACCORDANCE WITH THE PROCEDURAL REQUIREMENTS OF THE ACT

A. The Board here found that the Union had been chosen by a majority of the employees in the appropriate bargaining unit as their representative and that it was therefore the statutory exclusive bargaining representative (R. 11, 28). To the extent that in reaching this finding the Board accepted the ruling of its regional director as final if not arbitrary, it was acting with the consent of all parties, including respondent (R. 104). Respondent nevertheless now argues that, in so acting, the Board failed to comply with a statutory requirement necessary to its jurisdiction; that is, that such findings be made by the Board alone (Resp. Br., pp. 48–51, 52, 56–58). This argument is disposed of by the many cases in which courts have entered decrees based on Board orders issued upon consent of the parties. In such cases, not only a finding of majority representation but findings by the Board of any of the facts constituting unfair labor practices may be totally lacking. Yet the validity of such orders has been consistently upheld. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, discussed *infra,* pp. 14–15; *National Labor Relations*

Board v. *J. L. Hudson Co.*, 135 F. 2d 380 (C. C. A. 6), enforcing 42 N. L. R. B. 536, certiorari denied, 320 U. S. 740; *National Labor Relations Board* v. *Central Missouri Telephone Co.*, 115 F. 2d 563 (C. C. A. 8), enforcing 15 N. L. R. B. 798; *National Labor Relations Board* v. *Fickett-Brown Manufacturing Co.*, 140 F. 2d 883 (C. C. A. 5), enforcing 52 N. L. R. B. 32 (parties stipulated that the Board may make the findings made by the Trial Examiner); *National Labor Relations Board* v. *Henry Levaur, Inc.*, 115 F. 2d 105 (C. C. A. 1), enforcing 17 N. L. R. B. 1034, certiorari denied, 312 U. S. 682; *National Labor Relations Board* v. *William B. Carroll*, 120 F. 2d 457 (C. C. A. 1), enforcing 29 N. L. R. B. 348; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. 2d 497 (C. C. A. 5), enforcing 6 N. L. R. B. 818; *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. 2d 663 (C. C. A. 7).

In the *Hudson* case, the employer entered into a stipulation waiving the hearing called for by the Act as well as the right to Board findings of fact, save as to the applicability of the Act to its operations. It also waived the right to contest entry of a court decree except on the ground of inapplicability of the Act. 135 F. 2d at p. 383. However, when the Board sought enforcement of its order in the circuit court of appeals, the employer contended that since the Board had made no finding that the employer had engaged in un-

fair labor practices leading or tending to lead to strikes burdening commerce, the Board's jurisdiction had not been shown (*id.* at pp. 381–382).[4] The Circuit Court of Appeals for the Sixth Circuit rejected this contention in a decision which convincingly demonstrates the soundness of the Board's position here (*id.*, at p. 384):

> No valid reason appears why the Board should be required, in the face of such clear-cut stipulation, to do more than was demanded by the stipulation upon which the case was tried, that is, to determine whether the National Labor Relations Act was applicable to the respondent and its employees. This duty the Board performed with care, as is evidenced by its reasoning and the authorities cited for its conclusion that The J. L. Hudson Company is subject to the Act. The salient stipulated facts, which were sketched at the outset of this opinion, impel us to the same conclusion as that reached by the Board.
>
> Hindrance rather than aid would be given to *expeditious and inexpensive procedure before the National Labor Relations Board* were the Courts of Appeals, being

[4] The issue, as stated by the employer in his subsequent petition for a writ of certiorari (No. 114, October Term, 1943, pp. 10–11), was, "Whether findings by the Board of the existence of such unfair labor practices and that they affect commerce to burden or obstruct it, or have led or tend to lead to a labor dispute burdening or obstructing commerce or the free flow thereof, can be waived by the parties in a given case."

> vested with jurisdiction to enforce or to deny enforcement of the Board's orders, to say that an employer may not *lawfully waive the requirement which would otherwise exist, that the Board make findings of fact with respect to unfair labor practices,* or that the antagonists may not stipulate concerning the order to be entered by the Board, with its approval.
>
> Stipulations are favored in law; and there is authority for the procedure followed by the Board in the instant labor controversy. [Italics supplied.]

In the *Central Missouri* case, *supra,* a similar contention was rejected by the court on the ground that the employer had "expressly waived its right to findings of fact by the Board" (115 F. 2d, at p. 567). The court so ruled despite the fact that the stipulated order required the Company to bargain collectively with a named union as the representative of its employees, and the Board had made no finding that the union represented a majority of the employees. *Matter of Central Missouri Telephone Co.*, 15 N. L. R. B. 798, 801, 805–806. The same situation prevailed in the *Levaur* and *Carroll* cases, *supra,* where the parties stipulated, but the Board did not find, that the union named in the Board's order represented a majority in the stipulated bargaining unit. *Matter of Henry Levaur, Inc.*, 17 N. L. R. B. 1034, 1037, 1040, 1043, 1048–1051; *Matter of William H. Carroll*, 29 N. L. R. B. 343, 345, 349–

350. In the *Pure Oil* case, *supra,* the order of the Board which the court enforced was based on a stipulation which required the employer to disestablish a named organization which purported to represent the employees. *Matter of Pure Oil Co.,* 6 N. L. R. B. 818, 822.

If parties can waive the right to independent consideration by the Board of the entire question of unfair labor practices, they may do so as to one aspect of that question. We submit, therefore, that in view of its express commitment on this very point, respondent is in no position to raise the fifth question set forth in its brief at pp. 2–3; that is, whether the Board can make the rulings of its regional directors final in the case of consent elections.

B. For similar reasons, respondent is in no position to rely on the fact that none of the employees who voted against the Union joined in the consent election agreement (Resp. Br., pp. 2, 11–12). Respondent was aware when it entered into the agreement that employees were not parties. It ill behooves it now to attempt to escape the binding effect of this agreement by raising the alleged rights of employees who themselves assert no such rights here. Moreover, it is well settled that an employer can complain only of the infringement of its own rights, not those of its employees. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 558. See also

National Labor Relations Board v. *National Mineral Co.*, 134 F. 2d 424, 426-427 (C. C. A. 7), certiorari denied, 320 U. S. 753. No employee contended before either the Board or the court below that the Union was not designated by a majority of the employees. Here, as in the *Whittier Mills* case, *supra*, "There is no certain evidence that a majority of the present employees do not now desire representation" by the Union.

A similar issue was ruled on by this Court in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146. In that case the Board, without making any unfair labor practice findings, issued an order which, with the consent of the employer, directed it to withdraw recognition from a labor organization named the Crystal City Union. *Matter of Pittsburgh Plate Glass Co.*, 8 N. L. R. B. 1210. The Crystal City Union was not a party to the stipulation providing for entry of the order. 8 N. L. R. B., at p. 1211. The order was enforced by the Circuit Court of Appeals for the Eighth Circuit. 102 F. 2d 1004. In subsequent proceedings, in which determination of the appropriate bargaining unit for the Company's employees came before the Board, the Board held that in view of the prior unfair labor practice proceeding and the consent decree, the Crystal City Union could "no longer function as a labor organization" and that hence, "its wishes [as to the appropriate bargaining unit] are im-

material" (10 N. L. R. B. 1111, 1118). In its subsequent decision, in which it ordered the employer to bargain with another union, it held that, in view of the consent decree, negotiations between the employer and the Crystal City Union could not be treated as free collective bargaining nor could membership in that union be considered as evidence of a free choice by the employees. 15 N. L. R. B. 515, 523. When the case reached this Court, it was urged that the Board should have retried the issue of whether the Crystal City Union was in fact company-dominated and that it should have allowed that union to produce evidence on that point. 313 U. S., at pp. 158–159. This Court held that "The entry of the order upon stipulation and consent does not detract from its force." 313 U. S., at p. 159.

III

NONE OF THE ACTIONS OF THE BOARD OR ANY OF ITS AGENTS IN THE INSTANT CASE CONSTITUTED AN ABUSE OF DISCRETION

Once the jurisdictional facing of respondent's argument is removed, it becomes clear that its position is no more than that the Board abused its discretion in refusing to go into the question of Mrs. Kane's eligibility after her vote had been commingled. Thus it argues that the Board misinterpreted its own rule about challenges (Resp. Br., pp. 21–23, 27–29), that in any case the rule

is undesirable (*id.* at pp. 12–14), that it permits abuses by unions (*id.* at pp. 29–30), and that it unduly protects the secrecy of the ballot (*id.* at pp. 32–35). We submit that respondent has fallen far short of the requirement for demonstrating arbitrariness or caprice.

A. This Court has held that "The Board enjoys a wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees." *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31, 37. Accord: *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U. S. 206, 226; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 458; *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 380. Respondent appears to argue that this discretion in representation proceedings under Section 9 does not survive into subsequent unfair labor practice proceedings under Section 10 and that hence it is irrelevant here (Resp. Br., pp. 7, 24–25). The cases just cited leave no room for attributing to Congress the novel intention of giving the Board wide discretion in representation proceedings only to have that discretion ignored when the results of such proceedings are put in issue in unfair labor practice proceedings.[5]

[5] While we do not believe it is material to the issues in this case, because the Board's discretion regarding the determination of employee representatives exists in complaint

B. Exercising a judgment based on the holding of thousands of elections, the Board has adopted a policy of excluding post-election challenges. That policy is applicable to consent elections held in accordance with its rules and regulations. Respondent's case, however, rests in large part on the theory that the Board has no such rule or that in any case it was not applicable to the con-

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proceedings even where the question of the employees' choice has not been determined in a prior representation proceeding, respondent is incorrect in asserting that the consent election agreement and the proceedings held thereunder were "private and unofficial" (Resp. Br., pp. 44–47). In *Sun Ship Employees Association* v. *National Labor Relations Board*, 139 F. 2d 744 (C. C. A. 3), on which respondent relies, the consent agreement involved was executed on June 22, 1943 (Appendix to the Association's brief in the circuit court of appeals, p. 10a). At that time, the Board's Rules and Regulations contained no provision governing the holding of consent elections. See National Labor Relations Board Rules and Regulations, Series 2, as amended, effective October 28, 1942. The circuit court of appeals accordingly rested its conclusion that the consent election agreement was a private matter on the ground that "the agreements therein contained were those of the parties themselves, neither imposed upon them by any public body, statute *or regulation*, nor deriving their vitality from such sources" (139 F. 2d at p. 745; italics supplied). On November 26, 1943, however, the Board revised its rules and regulations in several respects. The new rules issued at this time, Series 3, for the first time contained regulations governing consent elections (Board's main brief, Appendix, pp. 81–82). Consent election agreements entered into under these rules must have "the approval of the Regional Director" (*id.*, p. 82). It is clear, therefore, that the action of the regional director in the instant case was taken on behalf of the Board and not as a private party, and that the Board so regarded it.

sent election here (Resp. Br., pp. 21–24, 27–29, 36–40, 42–43). There is no basis for this assertion.

Paragraph 6 of the consent election agreement in this case provides for participation in the election of authorized observers representing all parties and that they shall be permitted to participate in order to "challenge the eligibility of voters" (R. 105). Respondent ignores this paragraph and attempts to concentrate attention on paragraph 7 which provides for the filing of objections within five days and also provides for the filing of a report on objections and a report on challenges (*ibid.*). The objections which may be made within five days under this paragraph are of two kinds. The first of these, objections "to the conduct of the ballot", is obviously not involved here. This phrase applies only to what may be termed the mechanics of the election, the form of the ballot, electioneering near the polls, and the like.[8] The second phrase, which covers objections "to a determination of representatives based on the results" of the ballot, applies not to a question concerning the results of the election, which is what is involved here, but to questions concerning the propriety of issuing a determination of representation based thereon. Moreover, an objection of either of these types which is otherwise within the terms of the five-day rule, but which could have been raised before or at the election,

[8] *Matter of Walker Vehicle Co.*, 7 N. L. R. B. 827, 833.

may be deemed waived by failure so to raise it (Bd. Br., pp. 71–73).

Respondent, however, construes paragraph 7 of the agreement as inviting parties to withhold challenges at the time of the election and to file them at any time during the following five-day period, after all votes have been commingled; it construes the paragraph as permitting this procedure even where the parties knew of the alleged ineligibility at the time of the election (see particularly Resp. Br., pp. 27–28). This interpretation attributes to the Board the intention of making paragraph 6 a dead letter and of encouraging parties to ignore altogether their right to have watchers at the polls. The Board's rules and its practice thereunder refute this inplausible interpretation. Respondent's interpretation receives no strength from the fact that the Chrysler Corporation, which, like respondent, has asked the Board to accept a post-election challenge, follows the practice of sending no observers to the polls (Resp. Br., p. 37, footnote). The answer is that it should. Its refusal to avail itself of the rights provided by the Board's regulations does not require that it be given other rights as a substitute.

We submit that, as shown in our main brief, paragraphs 6 and 7 of the consent election agreement clearly prohibited post-election challenges (pp. 68–71).

If there were any doubt as to the meaning of the consent election agreement, it would have to

be resolved by reference to the Board's decisions, since paragraph 1 of the agreement provides that the election shall be held "in accordance with * * * the customary procedures *and policies* of the Board" (R. 104; italics supplied). As we have shown in our main brief (pp. 40–41), the Board's established policy is to reject post-election challenges. This policy is clearly binding on respondent in view of its participation in the consent election agreement.

Respondent's characterization of the agreement as "a snare and trap for the unwary employer" because of its alleged ambiguity (Br., p. 37), if interpreted to bar post-election challenges, can have no applicability here for respondent denies that it knew of Mrs. Kane's alleged ineligibility until after the election. If this was true, its delay in raising the challenge was not due to its misunderstanding of the agreement.

C. Respondent attempts to demonstrate that the Board's post-election challenge rule is unreasonable and arbitrary by suggesting certain hypothetical situations (Resp. Br., pp. 12–14). In resolving the issues which it raises, however, respondent erroneously assumes that the Board's rule applies only where the objecting party has knowledge of the grounds of ineligibility at the time of the election. The Board's rule respecting post-election challenges does not depend on a showing of such notice. In the ten cases applying

the rule cited in our main brief (pp. 41–42, n. 22), such notice appears in only one case. *Matter of Chrysler Corp.*, 63 N. L. R. B. 866, 868. In another case, on the other hand, it was alleged, and the Board assumed, that the objecting party had no knowledge of the asserted ineligibility until after the election. *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 511–512. In the remaining eight cases, there was nothing to show that the party did or did not have such knowledge.[7] Respondent's knowledge of Mrs. Kane's alleged ineligibility in this case is, of course, another reason why the regional director's ruling was not arbitrary, the issue discussed in Point II of our main brief, pp. 60–73. But it has no bearing on the applicability of the Board's rule as to post-election challenges discussed in Point I of our main brief, pp. 27–54.

The Board's rule cannot be made to appear unreasonable by suggesting the possibility of deliberate fraud (Resp. Br., p. 12). Fraud always calls for special remedies and the cases cited in our main brief show that the Board deals with it appropriately when it arises (p. 41, n. 21). Similarly, there is no basis for respondent's assertion that the Board's rule may encourage unions to send large numbers of ineligible voters to the polls

[7] Thus respondent is in error in asserting that in its hypothetical case, Union B, under the Board's rule, would not be estopped from questioning the two non-employee votes (Resp. Br., p. 13). It would be.

in the hope that some will slip by without challenge (Resp. Br., pp. 29–30). Since the employer supplies the election list in the first instance, and since no individual can vote without challenge by the Board unless his name is on the election list, this abuse could not possibly occur.

D. Respondent insists that since the Board is authorized to conduct a "secret ballot" or to use "any other suitable method" to ascertain employee representatives (Act, Sec. 9 (c)), it has no right to insist on preservation of a secret ballot (Resp. Br., pp. 32–33). In effect this argument means that, although Congress authorized the Board to conduct a "secret ballot", it did not authorize it to keep the ballot secret after it was conducted. It requires no argument to show that this interpretation of the Act is untenable.

Respondent relies on the fact that when there are a very small number of challenged ballots which are eventually held to be valid and are therefore counted, the votes cast by a few employees may become known (Resp. Br., pp. 32–33). Since there is no way of avoiding this situation, the Board must permit it to exist. In such cases, however, the challenged voter knows that his vote may become known, and if he is disturbed by this possibility, he may refuse to vote. A post-election challenge gives the voter no such opportunity. In any case, examination of a chal-

lenged ballot is a far cry from asking a person how he voted at an earlier date, or relying on other evidence for that purpose. In the case of the challenged ballot, the vote is irrevocably made at the time of the election,* and no amount of influence by the employer, a union, fellow employees, or other friends can change it. Quite the opposite is the case when the individual is required to testify at one time about what his preference was at another time. As the record here shows, the person in question may be unable to give any reliable testimony on this score (R. 109–110). Respondent's inability to see the impropriety of seeking such evidence (see Resp. Br., p. 9, footnote) underscores its refusal to give effect to the "secret ballot" provisions of the Act. In sum, under the rule which respondent advocates, every employee would know when he went to the polls that he might be called upon later to state how he had voted. Under the Board's rule, every employee who casts an unchallenged ballot can be sure that it will never thereafter be called into question, and those whose ballots are challenged are faced only with the choice of casting a ballot which may thereafter become known or of refusing to vote at all.

Respondent's contention that there is no reason to maintain the secrecy of Mrs. Kane's ballot, if she is not an employee (Br., pp. 34–35), ignores the fact that Mrs. Kane may well have to work in

* Cf. *Matter of Gluck Bros., Inc.*, 52 N. L. R. B. 1144.

the future as a garment worker. Respondent might be hesitant to hire her again if her testimony as to how she voted displeased it. Or Mrs. Kane may be afraid such will be the case. The Board should not subject her to such risks by requiring her publicly to disclose her vote.

IV

THE BOARD IS NOT RELYING IN THIS COURT ON ANY GROUND NOT STATED IN ITS DECISION

A. The Board has asserted in this Court the validity of Article III, Section 12, of its Rules and Regulations, which make the ruling of the regional director final in a consent election (Bd. Br., pp. 54–60). Respondent asserts that the Board has not previously relied on this rule and that the finality doctrine of the Board was evolved without reference to its rules and regulations (Resp. Br., pp. 51–56). Respondent is mistaken. The Board's decision, which incorporates the trial examiner's intermediate report (R. 11), expressly relied on Article III, Section 12 (R. 27, n. 14).

B. Respondent also asserts that the Board's decision rests solely on the theory that the regional director's ruling was not arbitrary and that hence it is error for the Board to urge here (Bd. Br., pp. 27–54) that its post-election challenge rule is reasonable (Resp. Br., 20–21). The Board's decision refutes this assertion (R. 12).

In it, the Board concluded its discussion of whether or not the regional director's ruling rejecting post-election challenges was arbitrary by stating that it was "in complete accord with the established principles and policy of the Board". (*ibid.*). Immediately thereafter, in a separate full paragraph, the Board stated the basis for its consistent policy of rejecting post-election challenges (*ibid.*). On this state of the record there is no basis for respondent's contention.

Respectfully submitted.

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OCTOBER TERM, 1945.

No. 950.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

A. J. TOWER COMPANY.

BRIEF FOR RESPONDENT, A. J. TOWER COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Index.

	Page
(1) The petition does not present an important question of Federal law heretofore undecided by the Supreme Court or one important to the administration of the National Labor Relations Act	1
(2) The decision of the Circuit Court of Appeals for the Sixth Circuit in *N.L.R.B.* v. *Capitol Greyhound Lines*, 140 F. (2d) 754, certiorari denied, 322 U.S. 763, is not in conflict with the decision of the court below	4

Citations.

Capitol Greyhound Lines, Matter of, 49 N.L.R.B. 156	2, 4, 5
Kellogg Switchboard & Supply Co., Matter of, 28 N.L.R.B. 847	2
N.L.R.B. v. Capitol Greyhound Lines, 140 F. (2d) 754, cert. den. 322 U.S. 763	2, 3, 4
Rogers v. Hill, 289 U.S. 582	4

Statute.

National Labor Relations Act, sec. 6	1
sec. 9(c)	3
sec. 9(d)	1

Supreme Court of the United States.

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BRIEF FOR RESPONDENT, A. J. TOWER COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(1) The petition does not present an important question of Federal law heretofore undecided by the Supreme Court or one important to the administration of the National Labor Relations Act.

The petitioner's assumption that the Board has power to make any regulations that *are not arbitrary* (Petr.'s Brief, p. 14) is repugnant to the provision of Section 6 of the Act—"as may be necessary to carry out the provisions of this Act" (Petr.'s Brief, Appendix, p. 27). The further assumption that the Board has power to give "finality," *i.e.*, non-reviewability, to election results administratively determined is not consistent with the provisions of Section 9(d) of the Act. This subsection, omitted from petitioner's tabulation of pertinent provisions of the National La-

bor Relations Act (Petr.'s Brief, Appendix, pp. 27-29), reads as follows:

> "(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

The petitioner's contention that it can give its proceedings in representation cases immunity from judicial review lacks substance.

According to petitioner post-election challenges based on ineligibility arose in the following consent elections: *Matter of Kellogg Switchboard & Supply Co.*, 28 N.L.R.B. 847, 852; *Matter of Capitol Greyhound Lines*, 49 N.L.R.B. 156 (Petr.'s Brief, p. 18, note 3). In the former case it appeared that objections were considered on their merits and

> ". . . if all the votes directly challenged in the objections were to be counted for the Independent, the majority obtained by the Unions would remain unimpaired." (28 N.L.R.B. at p. 852.)

In the *Capitol Greyhound Lines* case the court said:

> "The Regional Director, in overruling the post-election objection to Nolan's voting, had emphasized

the facts that Nolan was admittedly within the Unit and in the employ of respondent at the time of the election; . . ." (140 F. (2d) 754, 757.)

The instant case stands as the only consent-election case in which the employer made the objection, under Section 7 of the Standard Consent Election Agreement (Record, p. 105, note) that a non-employee had voted, and where, as pointed out by the court below, both the Regional Director and the Board declined to make a finding on the issue of status thus raised (Record, pp. 103, 104). Since the Act has been in operation there have been 16,436 consent elections (Petr.'s Brief, p. 17, note 2). The Act was approved July 5, 1935.

Further, the Government states the issue too sweepingly. It ignores the fact that the objection passed on in this case was filed by respondent within the time allowed under Section 7 of the Consent Election Agreement, entitled "Objections;—challenges, reports thereon," which provided that objections to the conduct of the ballot or to a *determination of representatives based thereon* may be filed with the Regional Director within five days after the issuance of the tally of ballots (Record, pp. 20, 58, 70; emphasis supplied). The question in the present case does not relate to "post-election challenges" generally, but relates solely to a timely post-election objection filed within the five days permitted under the Board's standard form of Consent Election Agreement, where such objection is that a non-employee has participated in an election although the Act contemplates a "secret ballot of employees" (Section 9 (c)), and his vote may have affected the result. If the lower court's requirement that such timely objections be passed upon interferes with the administration of the Act, the remedy is for the Board to eliminate from its Con-

sent Election Agreement form the clause providing that objections to the conduct of a ballot or to a *determination of representatives based thereon* may be filed within five days *after* the election. The Board does not need a decision of the Supreme Court to accomplish this.

(2) The decision of the Circuit Court of Appeals for the Sixth Circuit in *N.L.R.B.* v. *Capitol Greyhound Lines*, 140 F. (2d) 754, certiorari denied, 322 U.S. 763, is not in conflict with the decision of the court below.

"Decision" and "opinion" are not equivalent terms.

> "The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests. . . . The Judicial Code uses 'decision' as the equivalent of 'judgment' and 'decree'." *Rogers* v. *Hill*, 289 U.S. 582, 587.

In the *Greyhound* case the direction for an election provided that the employees eligible to vote should be those on the Company's payroll during the payroll period ending July 31, 1942. The election was to be held on September 2, 1942. The Company was requested to make up a list of eligible employees and the clerk assigned to this duty made up a list from the payroll of August 15th on the assumption that it was the same as the payroll of July 31st (49 N.L.R.B. 156, 158). As a matter of fact, between the two dates one new employee (Nolan) had been hired. Nolan voted at the election without challenge. The employer discovered the mistake and objected to the certification of the Union. The Board refused to set the election aside and subsequently, in an unfair labor practice proceeding for failure to recognize the Union, made an order against the Company. The Circuit Court of Appeals for the Sixth

Circuit enforced the order. It is clear that the *Greyhound* election was decided by *employees,* and by a majority of employees. The Board had discretion as to what payroll date should be used, and all it did was to ratify the use of the payroll list of August 15th, a date nearer the election than that originally selected. It could have ordered the use of the August 15th list in the beginning. The result was that the Union was chosen by a majority of the employees who voted and who were employees at the time of the election. The decision in no wise supports the view that the Board, by invoking "waiver" or "estoppel," may permit elections to be decided by non-employees. In the instant case the very point raised by the respondent's objections filed with the Regional Director was that Mrs. Kane was not an employee at the time of the election, and this issue was never decided, either by the Regional Director or by the Board. In the instant case the court below said,

> ". . . Since Nolan was admittedly an employee on the date of the election, it cannot be said that the Board was without jurisdiction to certify the Union as the bargaining agent of the employees. The statute gives the Board discretion to use any reasonable method it deems wise to determine whether a Union represents a majority of employees. Had the employer contested the fact of Nolan's employment as of the election and had the Board made no finding on that issue, the result in the *Capitol Greyhound* case might well have been different. . . ." (Record, p. 108).

Since the *Capitol Greyhound* case did not involve the issue decided by the court in the instant case, there is no conflict.

Conclusion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 60.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

A. J. TOWER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT, A. J. TOWER COMPANY.

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Subject Index.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement of the case	3
Summary of argument	6
Argument	7
Point I. The Board is without jurisdiction to find the respondent guilty of an unfair labor practice unless the employer has refused to bargain with a representative chosen by a majority of the employees in the unit. What is an unfair labor practice is defined wholly by statute and neither waiver nor estoppel can enlarge it	7
Point II. The decision of the Regional Director, confirmed by the Board, that the Company had waived its right to challenge the vote of Mrs. Kane or to object to the election because of her vote cannot be sustained	36
Point III. The decision of the Regional Director was arbitrary and capricious, and therefore cannot be allowed to stand	42
Point IV. A determination of a bargaining representative pursuant to a private agreement between the respondent and the Union does not relieve the National Labor Relations Board from the obligation of determining that such representative meets the statutory requirements when it seeks to hold the respondent guilty of a statutory unfair labor practice in refusing to deal with such representative	43

Page

Point V. The National Labor Relations Board may not delegate its statutory duties or avoid judicial review of its acts by providing by rule that in the case of consent elections the rulings of the Regional Director shall be final 51

Conclusion 58

Table of Authorities Cited.

Cases.

Aetna Fire Brick Co., Matter of, 56 N.L.R.B. 849 54, 55

A. F. of L. v. National Labor Relations Board, 308 U.S. 401 58

American Granite Finishing Co., Matter of, 28 N.L.R.B. 739 23

Chrysler Corp., In re, 63 N.L.R.B. 866 15, 16, 37*n*.

Great Lakes Steel Corp., Matter of, 15 N.L.R.B. 510 24, 28, 40

Kellogg Switchboard & Supply Co., Matter of, 28 N.L.R.B. 847 23

Mobile Steamship Assoc., Matter of, 11 N.L.R.B. 374 24

Morgan v. United States, 298 U.S. 468 48

National Labor Relations Board v. Capitol Greyhound Lines, 49 N.L.R.B. 156, 140 Fed. (2d) 754, cert. den. 322 U.S. 763 18, 23, 53, 54, 55, 56

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 47 57

Securities & Exchange Comm. v. Chenery Corp., 318 U.S. 80 55

Sun Ship Employees' Ass'n, Inc., v. National Labor Relations Board, 139 Fed. (2d) 744 44

Virginian Rwy. Co. v. System Federation No. 40, 300 U.S. 515 25, 26

STATUTES.

	Page
Judicial Code, as amended by Act of Feb. 13, 1925, sec. 240(a) (28 U.S.C. 347(a))	1
National Labor Relations Act, (29 U.S.C. c. 7, secs. 151-166)	
Sec. 6	25, 56
Sec. 8 (1), (5)	5
Sec. 9 (c)	47, 50, 55*n.*, 58
Sec. 9 (d)	58
Sec. 10 (a)	48
Sec. 10 (b)	57
Sec. 10 (c)	48, 57
Sec. 10 (e)	1, 48, 58
Sec. 10 (f)	58

REGULATIONS.

Board's Regulations, Art. III, Series 3, effective Nov. 1943	21, 22, 46, 51, 52

MISCELLANEOUS.

House Report No. 1147, Committee on Labor, 74th Cong. 1st Sess. p. 23	57
Report of the Attorney General's Committees on Administrative Procedure (1941)	57
Restatement of the Law of Contracts	54
Williston on Contracts	54

Supreme Court of the United States.

OCTOBER TERM, 1946.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT, A. J. TOWER COMPANY.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 118-123) is reported in 152 Fed. (2d) 275. The decision and order of the National Labor Relations Board (R. 10-16) are reported in 60 N.L.R.B. 1414.

Jurisdiction

The jurisdiction of this Court rests on Section 240(a) the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. Section 347(a)), and on Section 10(e) of the National Labor Relations Act (29 U.S.C. Section 160(e)).

Questions Presented.

1. Whether under any circumstances the National Labor Relations Board (hereinafter sometimes referred to as the Board) may properly find an employer guilty of an unfair labor practice for refusing to bargain with a union chosen as bargaining representative by the vote of 50% of the employees in the unit involved plus the vote of one person not an employee of the employer.

2. Whether, when a Consent Election Agreement provides that "Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after the issuance of the Tally of Ballots," the National Labor Relations Board may hold that an objection to a determination of representatives based on the results of a ballot on the ground that such ballot contained the vote of a non-employee was waived although filed with the Regional Director within five days after the issuance of the Tally of Ballots.

3. Whether the ruling of waiver by the Regional Director under the circumstances set out in paragraph 2 above was arbitrary or capricious.

4. Whether the National Labor Relations Board may escape its statutory obligation to determine who is the exclusive bargaining representative of employees under the National Labor Relations Act by permitting *some* of the parties to be affected by such determination to make a private agreement that the determination of such question by the Regional Director shall be final and binding on *all* parties affected by the determination, and in addition thereby avoid all judicial review of such determination by the Regional Director.

5. Whether the National Labor Relations Board may avoid judicial review of its acts by providing by rule that

in the case of consent elections the rulings of its Regional Directors shall be final.

Statement of the Case.

The facts upon which the present controversy turns may be briefly summarized as follows:

Under date of April 27, 1944, the A. J. Tower Company (sometimes hereinafter called the Company) and Local No. 24, Waterproof Garment Workers Union (hereinafter called the Union), executed an Agreement for Consent Election (Exhibit B-3-B, R. 104). Under this agreement the Company furnished the Regional Director of the National Labor Relations Board, who was to conduct the election, with a list of employees on its payroll for April 21, 1944, the payroll date fixed in the agreement for determining eligible voters (R. 105). On this list appeared the name of Jennie A. Kane and against it the notation "Out Sick" (R. 19). The fact was that Mrs. Kane had last actually done work for the Company on March 24, 1944, and did not enter the plant from that day until May 5, 1944, the date of the election, when she presented herself at the voting place and voted (R. 21). When the Company furnished the list above referred to it believed Mrs. Kane was out sick and had not left the Company's employ (R. 58). It was still under that belief at the time of the election and did not, therefore, challenge her voting.

The election resulted in 116 votes being cast in favor of the Union and 114 votes against it, with one additional vote challenged by the Union (Board Exhibit 3D, R. 107), which challenge has not yet been passed upon. A day or two after the election, an employee came to the superintendent of the respondent's plant and made a protest because Mrs. Kane had voted, stating that she had left the employ of the Company prior to the election (R. 56, 57).

The superintendent investigated the complaint by going to the office of the United States Employment Service (R. 58), where he found that Mrs. Kane had on April 28, 1944 (Respondent's Exhibit 1, R. 60, 116) registered as available for employment. He also learned she had applied to the Division of Employment Security of the Commonwealth of Massachusetts for unemployment benefits (R. 59, 110). Knowing that, if Mrs. Kane had applied for such benefits, a notice must have been sent to the Company, the superintendent returned to the plant and had a search made of the Company's files (R. 59), resulting in finding a notice from the Division of Employment Security of the Commonwealth of Massachusetts with a notation on it indicating it was mailed to the Company on May 1, 1944. This notice is set out in full on pages 116 and 117 of the Record. This notice stated that Mrs. Kane had applied for unemployment benefits on April 28, 1944, gave the respondent as her last employer, the date of separation from employment as March, 1944, and the reason for separation as follows: "Left—couldn't do heavy work of carrying bundles which was part of her job." This notice was found in the files of the Company by the factory superintendent on May 8, 1944, three days after the election. This was the first time the notice had come to his attention (R. 61). As it clearly indicated that Mrs. Kane was not "out sick" as the Company thought, but had voluntarily separated herself from employment with the Company as long ago as March, and as the superintendent had also learned in the course of his investigation, as already indicated, that on April 28, 1944, Mrs. Kane had likewise registered with the United States Employment Service as available for work, the Company, on May 9, 1944, filed with the Regional Director an objection to his basing any determination of representatives upon Mrs. Kane's ballot, the objection being grounded on the fact that Mrs. Kane was not an employee at the time she

voted. The objection was filed within the five days provided in the Consent Election Agreement for filing objections to the conduct of the ballot or "to a determination of representatives based on the results thereof" (R. 20). The objection appears in full at pages 114-115 of the Record (Exhibit B-6).

The Regional Director made an investigation of the objection and held a conference with the parties at which the Company presented a signed statement of Mrs. Kane's admitting she had applied for unemployment compensation benefits prior to the election and that she had cast her vote for the Union at the election (Exhibit R-2, R. 62, 117). The Regional Director then filed a Report on Objections in which he failed to find whether or not Mrs. Kane was an employee at the time she voted (R. 111), but in which he held that the Company by "oversight" failed to challenge Mrs. Kane at the balloting (R. 112) and that by thus failing to challenge Mrs. Kane at the balloting, had waived its right "to challenge her vote or to object to the election on this ground" (R. 111). The Regional Director then proceeded to "find and determine" Local No. 24 was the "exclusive representative of all employees" in the unit (R. 111).

Thereafter the Union requested the respondent to bargain with it and the respondent refused on the ground that the Union had not been validly chosen as the bargaining agent of a majority of the employees in the unit (R. 112, 113). The complaint of unfair labor practice from which the present proceeding stems was thereupon issued by the National Labor Relations Board (Exhibit B-1, R. 94), a hearing was held before a trial examiner, and the Board finally issued its decision confirming the ruling of the Regional Director that the respondent had lost its right to challenge the status of Mrs. Kane and that accordingly it was guilty of an unfair labor practice under section 8 (1) and (5) of the National Labor Relations Act in refusing to

bargain with the Union chosen on Mrs. Kane's vote. The order customary in cases of refusal to bargain was then issued by the Board and enforcement sought before the United States Circuit Court of Appeals for the First Circuit. That Court (R. 118-124) refused to enforce the order on the ground that the National Labor Relations Act "does not give the Board or the Court power to compel an employer to deal with a union which was not selected by a majority of his employees" (R. 121).

Summary of Argument.

I. The Board is without jurisdiction to find the respondent guilty of an unfair labor practice unless the employer has refused to bargain with a representative chosen by a majority of the employees in the unit. What is an unfair labor practice is defined wholly by statute and neither waiver nor estoppel can enlarge it.

II. The decision of the Regional Director, confirmed by the Board, that the Company had waived its right to challenge the vote of Mrs. Kane or to object to the election because of her vote cannot be sustained.

III. The decision of the Regional Director was arbitrary and capricious, and therefore cannot be allowed to stand.

IV. A determination of a bargaining representative pursuant to a private agreement between the respondent and the Union does not relieve the National Labor Relations Board from the obligation of determining that such representative meets the statutory requirements when it seeks to hold the respondent guilty of a statutory unfair labor practice in refusing to deal with such representative.

V. The National Labor Relations Board may not delegate its statutory duties or avoid judicial review of its acts by providing by rule that in the case of consent elections the rulings of the Regional Director shall be final.

Argument.

Point I.

THE BOARD IS WITHOUT JURISDICTION TO FIND THE RESPONDENT GUILTY OF AN UNFAIR LABOR PRACTICE UNLESS THE EMPLOYER HAS REFUSED TO BARGAIN WITH A REPRESENTATIVE CHOSEN BY A MAJORITY OF THE EMPLOYEES IN THE UNIT. WHAT IS AN UNFAIR LABOR PRACTICE IS DEFINED WHOLLY BY STATUTE AND NEITHER WAIVER NOR ESTOPPEL CAN ENLARGE IT.

A.

The National Labor Relations Board is wholly a creation of statute. Its jurisdiction and powers depend upon statute. The types of conduct which it is empowered to prevent, denominated unfair labor practices, are wholly defined by statute. Unless the Board can found its action in the present case on the statutory source of its power, it is without jurisdiction and its order is without effect and should not be enforced. It should be borne in mind also that this is an unfair labor practice case, not a representation case. The charge is that the respondent did one of those things the *statute* has prohibited. Unless this charge can be made out, the order of the Board is not entitled to enforcement.

The Board's complaint in the present case, on which the finding of unfair labor practice was made, alleges in substance that on or about May 5, 1944, the Union was designated by the *employees* in the unit involved as their representative for collective bargaining and continued so ever since; that thereafter the respondent refused to bargain collectively with such representative and thereby committed an unfair labor practice (Exhibit B-1, R. 94). There is no question as to respondent's refusal to bargain with the Union; it asserts its freedom from any obligation to bargain. The only question becomes, therefore: was the Union duly

chosen as their representative by a majority of the *employees* in the unit? This, as a practical matter, depends on whether the vote of Mrs. Kane is counted as the vote of an employee. The Regional Director, however, whose decision the Board affirmed, did not pass on the question of whether Mrs. Kane was an employee, but ruled that "the Company has waived its right to challenge her vote or object to the election on this ground" (R. 111). (We shall discuss later the question of whether the Regional Director had any basis whatsoever for holding that the Company had waived its right to challenge Mrs. Kane's vote. It was undisputed that the Company had filed a challenge to her vote within the five days provided in the Consent Election Agreement for the filing of "objections to the conduct of the ballot or *to a determination of representatives based on the results thereof*" (emphasis added) (R. 105).) The Board, by majority decision, Member Reilly concurring on other grounds, held that the Regional Director was correct in ruling "that the respondent could not for the first time challenge the vote of Kane after the results of the election had been announced" and that the rulings of the Regional Director would not be "disturbed" (R. 11). It is thus apparent that neither the Regional Director nor the Board passed on the question of whether Mrs. Kane was an employee at the time she voted, and held, in effect, that the Union selected by the votes of a precise one-half of the employees plus the vote of Mrs. Kane* was the valid choice

* There were 116 votes cast for the Union in the election and 114 votes against it. The Union also challenged one vote. Although requested by the Company so to do (R. 114, 115), the Board has refused to date to pass upon this challenged ballot on the ground that, in the light of its decision as to waiver by the Company of the right to object to Mrs. Kane's vote, it is immaterial to determine the validity of the Union's challenge. For the purposes of the present proceeding, therefore, it must be assumed that the challenge would be decided adversely to the Union and that

of a majority of the employees and the valid representative of *all* employees, whether or not Mrs. Kane was an employee, and that the Company was guilty of an unfair labor practice in not bargaining with a Union so chosen. As the Board has thus decided that the Union was validly chosen whether or not Mrs. Kane's vote was that of an employee, we are entitled to test the correctness of that decision by assuming (as the Company believes the evidence shows) that she was not an employee. The Board is then in the position of saying that, where 115 employees vote for a Union and 115 employees vote against it, and a non-employee also votes for the Union, the Union is thereby to be deemed selected by a majority of the employees and to

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the ballot, when opened, would be a vote against the Union, bringing the tally to 116 votes for the Union, and 115 against it. Subtracting Mrs. Kane's vote from the Union's 116 votes would result in a tie ballot of 115 to 115 (R. 17, n. 1). Put another way, the Board has decided that 115 valid votes plus Mrs. Kane's vote, whether or not valid, have decided the election. The evidence is clear beyond peradventure that Mrs. Kane voted for the Union (see her own signed statement made three days after the election (R. 62; Exhibit R. 2, R. 156)); but even if, as the Board, for some strange reason, seems to feel (R. 12), it is improper to go into the question of how Mrs. Kane voted when that fact is vital to the rights of the Company and to the rights of the employees who voted against the Union, that would merely produce a situation where the Board would be unable to tell whether or not there had been a valid election. A finding of an unfair labor practice could not be based on any such absence of knowledge as to whether there was a valid election. The remedy in that case would be another election—a remedy which has been open to the Board from the beginning, and which has been frequently suggested by the Company, but which, for some inexplicable reason, the Board has always seen fit to ignore.

As to the propriety of inquiring into the fact as to how Mrs. Kane voted (which will be discussed more at length hereafter), it may be pointed out that in all elections, and they are not infrequent, which turn on a single vote and that vote is challenged, the Board as a matter of routine goes into the question of whom the vote is for.

be the representative of all. The Board then proceeds to hold a company guilty of an unfair labor practice for refusing to bargain with a union so chosen.

We submit that the position of the Board cannot be the law. The question of whether a union is selected by a majority of *employees* is a question of fact. It concerns not only the Company but the employees who voted against the Union, and under some circumstances it might concern other unions. It is the Board's duty to determine this fact. Its jurisdiction and power to act depends on this fact. The fact cannot be established by advertent or inadvertent waiver or estoppel. It is jurisdictional, and, if it does not exist, jurisdiction does not exist, and the whole attempt to find the respondent guilty of an unfair labor practice rests upon an unsound premise. The statute states that the bargaining representative must be chosen by a majority of the "employees." Until a majority is so chosen, there can be no refusal to bargain which violates the statute.

The above view, which found acceptance with the Circuit Court, had also been argued by the respondent before the Board and, while it was rejected by a majority of the Board, Member Reilly, who filed an opinion specially concurring in the result (R. 14-15), recognized the validity of the argument set forth above. As he put it:

> "Although I have consistently held that binding commitments may estop parties from utilizing the processes of this Board, I do not believe that any doctrine of estoppel is applicable here. The Board's jurisdiction under the Act to prevent an employer from engaging in unfair labor practices in violation of Section 8 (5) is restricted to instances where there is a refusal to bargain with a representative of a majority of employees in an appropriate unit. A determination that a labor organization is the majority repre-

sentative contemplated by the Act, where its designation as such depends upon ballots cast by individuals who were not employees when said ballots were cast, is clearly not within the Board's power. Therefore, *a fortiori*, no theory of 'waiver' or 'estoppel' will supply the Board with such jurisdiction" (R. 14-15).

The error in the Board's decision becomes emphatically clear if we look at it from the point of view of the employees. The only parties to this record are the Board and the respondent. The Board also recognizes (as, of course, does the Company) that the Union, although not a party of record, has an interest. It is impossible, however, to find anywhere in the record or brief filed by the Board any recognition of the fact that there are still other parties who have equally valid interests equally entitled to protection. These are the employees who voted against the Union, and, if the Company is correct (and the contrary cannot be assumed), there are just exactly as many of them as there are of employees who voted for the Union. If the Board's decision stands, the Union becomes the bargaining agent for all employees, those who voted against the Union as well as those who voted for it. The right not to be represented by a particular union is just as valid and sacred a right as the right to be represented by a union. That right belongs to the employees. The Company cannot bargain it away, or give it up by inadvertence or waiver. The employees who voted against the Union were parties to no Consent Election Agreement, had no observers at the polls, and no opportunity to file post-election objections. Yet, if the Board is correct, the rights of the one-half of the employees who voted against the Union have been prejudiced, lost and given away because the Company was guilty of an alleged "waiver." The Board thrusts upon those employees a statutory bargaining agent which has

not been selected in accordance with the statute and tells those employees that they must accept this agent because of something the Company is alleged to have done or failed to do. It is submitted that the Board may not thus add to the statute or deprive these employees of the right not to be represented by a particular union unless that union has been chosen by a majority of *employees*, not by a bare one-half of the employees plus the vote of a non-employee or the vote of a person who may or may not be an employee.

The position of the Board and of the employees who voted against the Union may be highlighted, perhaps, if we consider what would happen if the Union and the Company had expressly agreed in advance of the election that a non-employee or a dozen or a hundred—the principle is the same—might vote in the election and have their votes counted and the votes of these non-employees were decisive of the election. Would the Board certify a union so chosen or hold the Company guilty of an unfair labor practice in not bargaining with a union so chosen? Or what would the Board do if the agreement happened to be with the 50% of the employees who did not want the Union and the Union was thereby defeated? The answer in either case is obvious. If the Company cannot bring about this result designedly and expressly, how, it may be asked, may it do more by inadvertence or waiver?

Another and very common situation will illustrate the unsoundness of the Board's position in this case. Let us assume there had been two unions on the ballot and that Union A received one more vote than Union B and no votes were cast for any third alternative, so that on the face of the balloting Union A had a majority of the votes cast and would appear to be entitled to certification as exclusive bargaining representative. Let us also assume that, paralleling the instant case, it developed that two of those who voted for Union A were non-employees, but had

not been challenged at the moment of balloting. Upon these facts it would be clear that a *majority* of the *employees* voting had selected Union B and not Union A. Would the Board, nevertheless, be warranted in directing the Company to bargain with Union A? Must the Company under penalty of being charged with an unfair labor practice by the Board bargain with Union A and refuse to bargain with Union B, thus committing the undoubted unfair labor practice under the law of refusing to bargain with the representative in fact chosen by a majority of the employees? Can the "oversight" of the Company in failing to challenge at the polls thus change the Congressional mandate that the bargaining representative shall be that one the majority of the *employees* choose?

It may be argued, however, that in the case just put Union B might have had no knowledge of the non-employee status of the two employees at the time of their voting, and therefore might not be guilty of oversight in not challenging at the polls. This raises several interesting possibilities and demonstrates how completely involved in inconsistencies the Board must become once it departs from the clear statutory requirement that representation must depend on actual majority choice of *employees* and attempts to rely upon such illusive doctrines as estoppel and waiver. Thus, in the circumstances just suggested, if Union A demands bargaining rights, the Company must grant them since the Company is estopped, upon the Board's theory in the present case, from questioning the two non-employee votes. If, however, Union B demands bargaining rights, the Company should grant those too, because, on a parity of reasoning, Union B is not estopped from questioning the two non-employee votes. It will be answered to the foregoing that, of course, the Board would not allow itself to be put in the position where this absurdity could arise, but would throw out the challenged

ballots once and for all. This may well be true, but the Board could do this only at the sacrifice of its logic in the present case, and by recognizing the principle here contended for by the respondent. Moreover, what will the Board do with the case where Union B did technically have knowledge that the two individuals were non-employees, but through oversight failed to challenge them at the polls? Is the Board going to say that the bona-fide majority of the employees who chose Union B as their bargaining agent have lost their right to the representation the statute undertook to give them and must patiently submit while the Company engages under order from the Board in the unquestioned unfair labor practice of making a contract with Union A?

All of the foregoing focuses attention on what is a basic misconception by the Board of what the National Labor Relations Act demands and what its function is under the Act. The Board in the instant case has acted as if the question of whether the Union was the legal bargaining representative of the respondent's employees was a matter between private litigants or private contracting parties. What the Board does not appear to appreciate is that the question of who is the legal bargaining representative of any particular group of employees is not solely a question between the employer and the Union. It is a question in which the Company and the Union are concerned to be sure, but it is also a question in which all employees are concerned, both those who voted for the Union and those against it. It might also have been a question in which another union was concerned had there been another in the ballot, as there frequently is, and it is certainly a question which concerns any union which might be considering offering itself as bargaining agent in the future. Lastly, and not at all of least importance, it concerns the public which is entitled to look to the Board to administer the law as

written by Congress, and to reduce industrial strife by assuring to workers that they are represented by the agents a majority of them actually choose. This means that the determination of whether a union has been chosen by a majority of employees in a unit requires something in the nature of a finding *in rem*, a fair and judicial determination of what the fact is which will be the same for all parties at all times, and will not be for any a fiction which they are required to accept because of technical doctrines of waiver and estoppel. The statute gives warrant to the Board for proceeding on no other basis.

In *In re Chrysler Corporation*, 63 N.L.R.B. 866, the Board has again undertaken by a majority vote to permit an election to be decided by the vote of a person not an employee, relying on its decision in the instant case as its only authority and precedent. Member Reilly dissented and his discussion of the doctrine of the majority is pertinent in the present connection:

> "In the Tower case (*Matter of A. J. Tower Company*, 60 N.L.R.B. 1414), relied upon by the majority, I concurred specially, as it seemed to me that other facts in the record indicated that the voter whose employee status was in issue was still in the employ of the company on the day the poll was taken. Here we have nothing to support such a conclusion. While I recognize the administrative advantages in the doctrine of the majority decision, I do not believe that the failure of an employer to exercise his right of challenge affords a basis for counting the vote of a person who is, *ex hypothesi*, a non-employee. Such a rule is salutary when the issue is limited to the question of whether a certain voter, conceded to be an employee, is within one of the eligible categories described in the appropriate bargaining unit, for the statutory duty of

defining the bargaining unit vests this Board with broad discretion.

"It should be remembered that representation proceeding involves not only the rights of the parties of record (i.e., the company and the putative representative), but also the rights of third parties, the employees—the only persons having any affirmative rights under the statute. Under the Act, we have no power, either upon our own motion or by stipulation of the parties of record, to certify a bargaining representative selected in whole or in part by persons other than employees. Even assuming, therefore, that the failure of the company to challenge the Taylor vote was a waiver of a procedural remedy, I have difficulty in understanding how a waiver can confer on this Board a power which could not be conferred upon it by express authorization. It is fundamental that the doctrine of constructive waiver cannot cure a jurisdictional defect.

"It would seem to me, therefore, that this case should be disposed of either by ordering a new election or by remanding the case to the Region so that evidence may be adduced with respect to the status of the disputed voter" (63 N.L.R.B. at pp. 869-870).

One or two points mentioned in the Board's decision require passing comment. The Board states (R. 12):

"We have consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result."

Passing over the point, which will be discussed later, that this was hardly a post-election challenge since it was made within the five days permitted by the Consent Election Agreement, or, if it was one, was a challenge permitted by the terms of the Agreement, it is submitted that the Board's desire to avoid a "protracted resolution of objections" cannot furnish a basis for disregarding statutory obligations. Moreover, whatever might be the situation if the objection in the present case was "disregarded or suppressed against the contingency of an adverse result," there is not the slightest evidence that that was the case. The Company's evidence was to the effect that the notice from the Division of Employment Security of the Commonwealth of Massachusetts, which was the first intimation the Company had that Mrs. Kane had quit its employ, was received by a clerk and filed without coming to the attention of the executive who was acting for the Company in connection with the election (R. 61; 79, 80). The most that the Regional Director charged the Company with was that "in the opinion of the undersigned it failed, *through oversight*, to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls" (emphasis added) (R. 112). There is nowhere the slightest suggestion that the Company "disregarded or suppressed" an objection "against the contingency of an adverse result." Nor has a possible motive for doing such a thing been suggested or any possible gain which the Company would achieve by holding back an objection to Mrs. Kane's status. The Board's suggestion, therefore, if it amounts to that, that the objection in this case was withheld for ulterior purposes is entirely gratuitous and unwarranted by anything in the record. The same comment may be made as to the implication in the Board's brief in this Court that the facts had been hidden by the respondent (Brief for the Board, p. 72).

The respondent recognizes that there may be situations where objections might be deliberately held back for long periods of time for the purpose of using them at an opportune moment to discredit a union or where, even acting in good faith, an employer might not become advised of the existence of grounds for an objection until long after an election, and that to permit the bringing up of objections under these circumstances long after an election may be from many points of view undesirable. Whether or not, when such a situation arises, the Board or the Courts should feel empowered to deal with it even in disregard of the statutory requirement that bargaining representatives should be chosen by employees, not by non-employees, or whether that situation will require further legislation for correction the respondent is unable to say. Suffice it for the present case that it does not present a situation such as that imagined. The objection was not suppressed out of malice or with evil intent; and it was promptly made when it finally came to the attention of the executive representing the Company in the election proceedings and within the five days following the election permitted for "objections to the conduct of the ballot, or to a determination of representatives based on the results thereof" (R. 20, 105).

Before closing the discussion of this part of the case, some reference should be made to *N.L.R.B.* v. *Capitol Greyhound Lines*, 49 N.L.R.B. 156, 140 Fed. (2d) 754, cert. den. 322 U.S. 763, the case chiefly relied on by the Board in its brief. In that case the direction for an election provided that the employees eligible to vote should be those on the Company's payroll during the payroll period ending July 31, 1942. The election was to be held on September 2, 1942. The Company was requested to make up a list of eligible employees and the clerk assigned to this duty made up a list from the payroll of August 15 on the assumption that it was the same as the payroll of July 31. As a matter of fact

between the two dates one new employee (Nolan) had been hired. This employee voted at the election without challenge. The employer later discovered the mistake which had been made and objected to the certification of the Union. The Board refused to set the election aside. The Circuit Court sustained the Board. Although language may have been used by the Board that may have gone beyond the need of the case, it is clear that the decision contains nothing startling or in any way decisive of the present case. The election was decided by *employees*, and by a majority of employees. The Board has entire discretion, within reasonable limits, as to saying whether the payroll list of one date or of another date shall be used to determine the list of eligible voters. The Board indicated originally the use of the payroll list of July 31st. The Company in fact used the payroll list of August 15th, a date nearer the election and therefore, if anything, a more representative list than the earlier list would be. All the Board did by decision was to affirm the use of the more recent list of employees. It could have ordered the use of such list in the beginning. When it turned out to be the list in fact used, it is hard to see what could prevent the Board in affirming such use. The result was that the Union was chosen by a majority of the employees who were such at the time of the election, and that is a full compliance with the statute. The decision in no way supports a contention that the Board may permit elections to be decided by non-employees.

B.

We now turn to the question of what the Board has to say in its brief in support of its decision to allow the election in this case to be decided by the vote of a person who, for the purposes of this case, must be assumed to be a non-employee. In Part I of the brief in this Court the Board

seeks to justify its action without reference to the Consent Election Agreement; in Part II the Board urges the Consent Election Agreement as a justification. This part of the respondent's brief will deal only with Part I of the Board's brief. Part II of the Board's brief will be treated under subsequent points of the respondent's brief.

The Board's argument in Part I of its brief, very succinctly put, is that it has a "rule" not to entertain post election challenges to eligibility of votes, that such rule is "reasonable," and, therefore, that it is justified in this case in holding the respondent guilty of the unfair labor practice of refusal to bargain even though the bargaining representative was not chosen by a majority of employees as required by statute.

At the outset it may be noted that this argument represents a new position different from that on which the Board based its decision, and a position not urged by the Board in the Circuit Court of Appeals. In its decision the Board, while stating that the action of the Regional Director was "in complete accord with the established principles and policy of the Board" (R. 12), in fact rested its decision upon the principle that it would "not disturb the rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" (R. 11). In its brief in the Circuit Court the Board did no more than reassert this position. The following from page 9 of that brief will summarize the position of the Board before the Circuit Court:

> "The Board has, therefore, consistently ruled, in accordance with the provisions of the consent election agreement, that it and the parties are bound by determinations of the Regional Director under consent election agreements, in the absence of capricious or arbi-

trary conduct on his part, much as the award of an arbitrator under an arbitration agreement is binding in the absence of fraud or such gross mistake on the part of the arbitrator as would necessarily imply bad faith. And it was in line with this established policy that the Board refused to redetermine the issue of majority in this case."

It is thus for the first time in this Court that the Board seeks to shift ground and to support its decision upon a new principle urged by it. Without at this juncture going into the propriety of the Board's doing this, it is submitted that the new principle urged will not answer the Board's purpose. In the first place, the Board presents its argument as if it had adopted and promulgated a formal rule or rules about its non-acceptance of post-election challenges. Thus on page 31 of its brief it states: "Judged by the test of reasonableness, we submit that the Board's rules representing post-election challenges are valid." On pages 78-82 of its brief, however, the Board presents what it refers to (p. 78) as the "pertinent provisions of the Rules and Regulations of the National Labor Relations Board." These Rules and Regulations are not part of the record on certiorari and were not before the Circuit Court of Appeals, and it is questionable if the Board may now urge their consideration by this Court. Passing that, however, a close perusal of these Rules and Regulations will reveal that they do not embrace at any point, in the case of either an ordered election or a consent election, any rule that the Board will not consider post election challenges. Indeed, so far as ordered elections are concerned—and in its brief the Board places much reliance on its procedure in ordered elections as supporting the reasonableness of its "rules"—there is every indication that post-election challenges will be considered as the only mandatory requirement as to

making any objection to an election in that "within five (5) days thereafter the parties may file . . . an original and three copies of Objections to the conduct of the election or conduct affecting the results of the election" (Section 10 of the Rules and Regulations, Petitioner's Brief, p. 79). There is no requirement that challenges be made to ballots at any specific time, let alone at the time of the balloting, and there is not the slightest indication that an objection to an election on the ground that a non-employee voted in it may not, as well as any other objection to the conduct of the election, be filed within five days after the election is held. The rule (Section 12 of the Rules and Regulations, Petitioner's Brief, pp. 81-82) relative to consent elections is equally barren of any provision barring the consideration of post-election challenges or objections.* It is thus apparent that, when the Board speaks of its "rules respecting post-election challenges," it is not referring to any rule duly made and promulgated under its statutory rule-making power. Whether any rule so promulgated that challenges must be made at the time of balloting or never would be valid we do not need to inquire. It is clear that no such rule has been promulgated and we have no such situation as that to deal with here.

What, then, does the Board mean when it speaks of its "rules respecting post-election challenges being valid" and urges that as a ground for allowing a non-employee to vote in an election? An examination of the Board's brief and of the cases cited by it (Petitioner's Brief, p. 41, footnotes 21 and 22) makes it clear that all the Board means is that in some cases it has, as a matter of decision in each case, refused to entertain post-election challenges, while in other cases it has entertained them, and that it thinks that, where it failed to entertain such challenges, its action was

* The provisions of the actual Consent Election Agreement involved in this case will be considered under Point II of this brief.

reasonable. Presumably in those cases in which it decided to entertain post-election challenges it also believes its decision is reasonable. It is thus clear that there is no "rule" about it even in a loose sense, but that, when the Board thinks it is not "reasonable" to entertain a post-election challenge, it does not do so, and when it thinks it is reasonable, it does do so. Thus it states that it does entertain post-election challenges if the Board's own agents knew of the ineligibility at the time of the balloting; or if the person to "benefit" from a refusal to entertain a challenge knew of the ineligibility (Petitioner's Brief, pp. 40-41).

Further, if we examine the ten cases cited by the Board in footnote 22 on page 41 of its brief which it offers as evidence of its "rule" not to entertain post-election challenges, we find all but *three* were decided subsequently to the Board's decision in the present case. All the remaining seven cases are, expressly or by inference, based on the Board's own decision in the present case. Of the three cases antedating the decision in the present case, the earliest, *Matter of American Granite Finishing Co.*, 28 N.L.R.B. 739, 740, while declining, for reasons given, to entertain a post-election challenge, refers to no "rule" on the subject; the next case, *Matter of Kellogg Switchboard & Supply Co.*, 28 N.L.R.B. 847, 852, 861, contains no express ruling that a post-election challenge will not be entertained, and the votes which were involved in that case could not have changed the result (p. 852); and the third case, *Matter of Capitol Greyhound Lines*, 49 N.L.R.B. 156, 157-159, is another case like the present where the Board took no action itself but merely refused to disturb action taken by the Regional Director under a Consent Election Agreement, and is a case, moreover, where the decision is supportable on entirely different grounds (see *supra*, pp. 18-19). As against these cases there is at least one flat decision antedating the present case where a post-election challenge was

entertained by the Board, viz., *Matter of Great Lakes Steel Corporation*, 15 N.L.R.B. 510; and one analogous case in which an election was set aside at the instance of the Company on the basis of a post-election objection by the Company that through error it had omitted nine eligible employees from the voting list, *Matter of Mobile Steamship Assoc.*, 11 N.L.R.B. 374. It is clear, therefore, that at the time of decision of the present case the Board had no clear or consistent rule that it would not entertain post-election challenges.

On this aspect of the Board's case and assuming, without conceding, that it is open to it to take for the first time in this Court the position it is now taking, the question is whether the Board may refuse to examine into the question of whether the bargaining representative was validly chosen because it feels in the particular case that it is "reasonable" to disregard the post-election objections to the non-employee status of a voter. It is submitted that there is no warrant under the law for any such position. This is an unfair labor practice proceeding. The Board has charged the respondent with refusing to bargain with the validly chosen representative of its employees. The respondent questions whether the representative was validly chosen—and this is the earliest time at which the respondent could raise the question in such way as to obtain Court review—and the Board declines to go into the question, but holds the respondent guilty of an unfair labor practice *whether or not* the representative was validly chosen. And the Board now defends this action upon the ground that it was "reasonable" to disregard the particular challenge.

The National Labor Relations Act makes no such provision for holding employers guilty of unfair labor practices irrespective of the facts, and because the Board thinks it is "reasonable" not to inquire into the facts. The mandate of Congress is that an employer shall be guilty of an unfair

labor practice of the character here involved only when he refuses to bargain with an agency chosen by a majority of *employees*. Congress gave the Board power to make rules "to carry out the provisions of this Act" (N.L.R.A. Sec. 6)—a power not made use of here, but which, even if availed of, would only permit the Board to "carry out" the provisions of the Act, not amend or add to them. The Board seems to feel that because the consideration of post-election challenges might add to its burdens or, as they believe, open the door to fraud or possibly lead to an invasion of the secrecy of the ballot, it is "unreasonable" to expect it to consider such challenges. We shall consider later how much substance there is to the Board's fears, but suffice it at this juncture to point out that where the objection is that the Act has not been complied with—that there has been no valid choice of representatives—the Board, until that objection has been eliminated, has no jurisdiction whatsoever, and it cannot assume jurisdiction merely on the basis of what it feels would be reasonable. If the Board feels that it should, under some circumstances, be permitted to hold employers guilty of unfair labor practices, not because they have committed or are committing them, but because at some point along the way they have been guilty of a procedural lapse, the Board should ask Congress to give it this power: it has no right to assume it. If the Board feels that a strict adherence to the provisions of the Act impose too severe a burden on it, and that there should be some procedural relaxation so that a method which produces a valid representative in the great bulk of cases may be followed in those cases where it does not produce a valid choice, again the Board's appeal should be to Congress.

The Board in the present instance seeks to analogize its position to that of this Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 560, where it was held that the provision in the Railway Labor Act that a

"majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class" meant, and was intended by Congress to mean, a majority of those electing to express their choice by balloting, provided a majority of the employees in the unit participated in the election. The situations are quite different. In the Virginian Railway Company case the statute was construed and the selection of representatives was found to be within the statute: a majority of employees had voted and a majority of that majority had selected the union. In the instant case, on the hypothesis on which the respondent is entitled to have the case considered, the representative has not been chosen in compliance with the statute—or at the very lowest the Board does not know whether the representative was validly chosen and says it does not care—but because of the alleged burdens or dangers which might come from post-election challenges, the Board wishes to disregard the statute and deal with the respondent as though the representative had been validly chosen. In other words, the Board would take the doctrine of the Virginian Railway case, and rewrite the National Labor Relations Act to read: a majority of those voting shall determine the representative, and it shall be immaterial whether or not they are employees unless that point is expressly raised by challenge at the time of the election. This, it is submitted, is not the construction of a statute, but the writing in of something not there. The fact that, had Congress so provided, such provision might be considered reasonable affords no excuse for the Board's assuming the prerogatives of Congress.

The foregoing has been written without giving any consideration to the question of how "reasonable" the Board really is in suggesting that it is proper to disregard the post-election objections in this case. This involves a point discussed in a later connection, but the facts warrant brief

consideration of it at this point. The facts are that the election in this case was held under a form of Consent Election Agreement which failed to contain a single word to the effect that challenges or other objections must be made at the time of balloting and would not be considered thereafter (R. 104-107). It was not mandatory, even, that the parties have observers present at the polls for the purpose of challenging: they were merely "allowed" (R. 105). The only mandatory provision in the whole agreement bearing on our present question was the provision of Section 7 of the agreement, headed: "Objections, challenges, reports thereon," the first sentence of which read:

> "Objections to the conduct of the ballot or *to a determination of representatives based on the results thereof,* may be filed with the Regional Director within five days after issuance of the Tally of Ballots" (emphasis added) (R. 105).

It is conceded that the respondent duly filed with the Regional Director within five days after issuance of the Tally of Ballots an objection to a determination of representatives based on the results of a balloting which contained the ballot of a non-employee (R. 114-115).

The Consent Election Agreement was on a printed form provided by the Board (see Petitioner's Brief, p. 56). The Board might have inserted in it a provision that all challenges must be made at the time of the balloting and that no post-election challenges would be considered, but it included no such provision. Instead, it gave notice to all and sundry that objections might be filed within five days after the election. The Board now, as will be pointed out later, seeks to make a nebulous distinction between an objection and a challenge, but it is clear that a challenge is one form of objection, and, as there was no requirement

that it be made before the five days, it would seem clear it could be made during the five days. Whatever the Board may be able to say about the "reasonableness" of not entertaining post-election challenges in ordered elections, its refusal to entertain the challenge in this case, far from being "reasonable," is completely lacking in equity.

The Board's position in this case is, moreover, in flat conflict with its decision in *Matter of Great Lakes Steel Corporation*, 15 N.L.R.B. 510, already referred to. In that case an election was held on August 18, 1939, and the Regional Director issued his report on election on *August 21, 1939*, showing that, out of 36 votes cast, 18 were for the Brotherhood of Locomotive Firemen & Enginemen, 18 were for the Independent Steel Workers Association, and that no votes had been challenged. The Independent Steel Workers Association filed objections on *August 25, 1939*, to the election report. As stated in the report of the case (p. 511), "*In its objections to the Election Report*, the Independent Steel Workers Association challenged the eligibility of one Cyril Delisle to vote in the election. . . . It claimed that Delisle had voted in favor of the Brotherhood of Locomotive Firemen & Enginemen and that the deletion of his vote would give it a majority of the votes cast." (Emphasis added.) Notwithstanding the fact that Delisle had not been challenged at the time of the election and notwithstanding the fact that the challenge was made several days after the election as an *objection* to the election report, both the Regional Director and the Board entertained the objection, considered it on its merits, and overruled the objection only because, after examining all the facts, they were able to make the flat finding that "Cyril Delisle was eligible to vote in the election" (p. 512). At no point does the Board make the slightest suggestion that a challenge is not an objection or that it could not be in-

cluded in a party's statement of objections to an election report or tally of ballots.

Although it seems hardly necessary in the light of the foregoing, for completeness we propose to discuss briefly the grounds which the Board advances as to why in the ordinary case it should refuse to entertain post-election challenges. The grounds which it gives are four: (1) If post-election challenges are entertained, employers may be guilty of fraud; (2) if post-election challenges are entertained, there may be delay in determination of bargaining representatives; (3) if post-election challenges are entertained, it may mean invading the secrecy of the ballot; and (4) if post-election challenges are entertained, the Board may have to change its election procedures. Each of these grounds will be considered in order.

So far as fraud is concerned, the Board feels that the allowance of post-election challenges may induce unscrupulous employers to include on the voting list the names of employees whose status as employees is "dubious or non-existent," and other possible maneuvers are mentioned whereby the basis might be laid for later invalidating the election through a post-election challenge (Petitioner's Brief, p. 43). It is hard to believe that counsel for the Board are seriously worried about these possibilities of fraud. It is difficult to see why an employer so dishonest as to resort to the schemes suggested—all of which assume dishonest co-operation of a number of employees or non-employees—merely to invalidate an election, would not adopt the more direct fraud of merely running in enough mattress voters to win the election, a fraud possible without any resort to post-election challenges. Also why does the Board assume that the only unscrupulous persons in the world are employers? Why does the Board not fear that its doctrine of not entertaining post-election challenges will encourage unscrupulous unions to

try to get all the persons who have at one time worked at a plant but who have quit to come back and vote at an election, since they would know that, if they were able to slip them by without challenge, later discovery of their non-employee status could not be availed of? The same would be true, too, if a union got entire strangers to vote and they got by without challenge. The short answer to all this is, of course, that dishonest people can always think up frauds and no human system is proof against them, and there is no more reason to suppose employers will be dishonest because post-election challenges are entertained than if they are not. Certainly there is no more reason for thinking that employers will take greater advantage of the post-election challenge situation than unions will of the knowledge that such challenges will not be entertained.

The second objection to the post-election challenge is that it may result in a "protracted resolution of objections" (Petitioner's Brief, p. 42). This objection has less merit even than the first one, at least when applied to the type of objection involved in this case. The question of whether a person is an employee or a non-employee is a very simple one, and usually very clear. In the great bulk of cases the employee is working on the day of the election, is on the payroll, and is on a particular job and the chance for any controversy is non-existent. The only opportunity, therefore, for "protracted objections" can be in the relatively insignificant number of cases in which, because of some special circumstances, some doubt as to status arises. If, as the Board presupposes, it is the desire of the employer to involve the proceedings in a "protracted resolution of objections," it is difficult to see why he may not accomplish this by a challenge at the time of the election just as much as by a post-election challenge. Moreover, even the fear of being involved in a "protracted resolution of objections" can hardly furnish warrant to the Board for departing from the statute. Its function, after all, is exactly that:

to resolve objections so that all parties may be assured that the bargaining agent who is to exercise exclusive bargaining rights is validly chosen. Congress did not say the Board might abdicate from this function whenever the resolution of objections became protracted.

Another form of the objection to post-election challenges just discussed is contained in the argument that "elections must be final at some point." "If," says the Board, "the time of the commingling of the ballots cannot be said to be a proper point before which a challenge to the eligibility of a vote must be made, no subsequent point of time could be set with greater validity. The decision below is based upon a principle which would permit the issue of eligibility to be raised at any time, even in a complaint proceeding following the election" (Petitioner's Brief, pp. 51-52). A short answer to the foregoing argument could be made that, so far as this case is concerned, the Board itself has picked out a point of time subsequent to the commingling of the ballots before which challenge may be made, this point of time being the end of the fifth day after the election (see *supra*, pp. 8, 27). From this point of view all that the respondent is asking is that the Board honor the time limit it has set itself. To dispose of this case, it is not necessary to decide the larger question as to whether a challenge at a subsequent time, "even in a complaint proceeding following the election," would be timely. On the larger question, however, the respondent is able to see nothing shocking in the possibility that the validity of an election might be attacked at some subsequent time. If the election was in fact invalid, why should it not be attacked? Everyone favors stability in industrial relationships, to be sure, but it is the stability of legally established relationships which should be protected, not those which by hypothesis have been illegally established. If, therefore, there was no jurisdiction in the Board to certify a union in the first instance, it is a

strange logic which complains that it is wrong to question this illegal certification at a later time. Instead of attempting to smother objections that it acted beyond its jurisdiction, should not the Board welcome them, and even be prepared of its own volition to invalidate certifications when it finds they are invalid? And as for the possibility that "even" in a complaint proceeding an employer might question the legality of the Board's action in certifying a union, how, it may be asked, is an employer to get the protection of judicial review of elections if he is not allowed to raise in complaint proceedings all questions going to their legality. The Board has been diligent in the past in persuading Courts that representation proceedings were not subject to direct judicial review; it can hardly complain if at the very least in complaint proceedings employers be given the right to try out all questions as to the legality of the certification.

The Board's plaintive wish that once it has made a determination of representatives it should never be questioned again is understandable, but is not supported by anything in the law. A certification once made is always subject and open to the attack that the bargaining agent has lost its majority status or that another bargaining agent has supplanted it as the preference of the majority. If these attacks against the status of an alleged bargaining agent can be made at any time, an employer, *a fortiori*, should be permitted to show that the claimed bargaining agent was not ever at any time the valid choice of the majority.

The next objection which the Board makes to post-election challenges is that it will mean an invasion of the secrecy of the ballot (Petitioner's Brief, pp. 44-48). In this part of their argument the Board is guilty of overlooking some very obvious facts, and of indulging in some very faulty reasoning. To begin with, the whole argument proceeds on the assumption that there is some statutory requirement that the secrecy of the ballot be preserved. However desirable

this principle may be and however much the Board should seek to secure it, the facts are that it is not required by the statute (a *secret* ballot is only one of the methods of determining representatives which may be used) and that the Board itself in its ordinary routine violates its alleged rule. This is true, of course, in the cross-check of cards where union membership is made known to Board agents or to third parties, such as certified public accountants, who make the check, or even to the employer, when, as sometimes happens, especially in small units, by agreement with the union, the employer makes the check itself. Beyond these cases, however, even in the ordinary election, the Board has no hesitation in invading the secrecy of the ballot when that is necessary to determine the result of the election. Thus if a ballot is challenged it is not dropped in the ballot box, but is placed "in a sealed envelope *which is* then marked to show whose ballot it contains" (emphasis added) (Petitioner's Brief, p. 39). If the election is a tie, except for the challenged ballot, it is obvious that when the challenge is passed on and the ballot is opened and counted, the whole world knows how that particular employee voted. As a practical matter, the same result occurs if there are several challenged ballots. Yet in none of these cases does the Board hesitate to invade the secrecy of the ballot. It does it, in other words, when it is necessary to do so in order to determine the results of the election, and should be equally willing to do so in the case of a post-election challenge.

Beyond this, however, in the particular case we are dealing with there would be no occasion to invade the secrecy of the ballot of any *employee*. The challenge here is to a voter on the ground that she was not an employee. That voter's vote has been cast and counted. If the Board should determine on the respondent's challenge that the voter was an employee, that would end the matter. It would not be necessary to make any further inquiry as to how she voted, be-

cause her vote, whatever it was, has already been duly counted and tabulated and reflected in the result. If, however, the Board should decide on the respondent's challenge that the voter was a non-employee, then there would be no reason whatsoever for not investigating to the fullest how she voted. Certainly the Board does not contend that a non-employee who illegally votes in an election has any right of privacy as to her ballot. If this point is appreciated, all the fine-spun arguments about the difficulty of determining how an "employee" voted go by the wayside. After all, it is only a simple question of fact, depending probably upon the credibility of one witness, the voter, and is no more difficult a fact to determine than other facts which the courts and the Board determine every day in the week All the fears which the Board purports to have that an "employee" may be afraid to tell the truth because he might offend his employer, or because, if it was a closed shop, he might offend the union and lose his job (Petitioner's Brief, pp. 45-46), are not realistic in this day and age; but in any event, the Board may relieve itself of its worries on those scores by realizing that the voter whose action it is inquiring into is not an "employee," has no "employer" to offend, or "job" to lose.

As a matter of fact, the post-election challenge in this case will involve far less invasion of the secrecy of the ballot than if the respondent had challenged at the time of the election. If the respondent had so challenged, the voter's ballot would have been segregated in an envelope with her name on it (Petitioner's Brief, p. 39). The challenge would then have been passed on at the end of the election, and if it was overruled, the envelope would be opened and the ballot counted. As it was a tie election, all the world would thus know how the voter voted; and this is strictly in accordance with the procedure the Board holds to be proper. Under the respondent's post-election challenge, however, if the

challenge is overruled no one will ever know how the employee voted. If the challenge is sustained, this will establish that the voter was not an employee and it will be immaterial, so far as employee ballot secrecy is concerned, how many know how she voted.

The final argument of the Board against post-election challenges is that, if they are permitted, it will be required "to alter its election machinery materially" and would not be able to handle "employee elections on the scale on which the Board has handled them in the past" (Petitioner's Brief, pp. 52-53). This is pure assertion and sure assumption. It is the type of *in terrorem* argument that a Government bureau always makes when there is any suggestion that it may have to depart from its established way of doing things. If the Board does have to alter its election machinery, may we not assume that it has sufficient ingenuity to accomplish the alteration successfully? In any event, can the necessity of such alteration excuse a departure from law? And as to handling elections on the same scale as in the past, Congress does not ask the impossible of the Board, and if complying with a law Congress has passed should really put undue burdens on the Board, may it not be assumed that Congress will provide for those burdens? Should we not, at any rate, assume that before we assume Congress intended this Board should depart from the law?

No analysis has been attempted of the cases and statutes cited by the petitioner with respect to political and corporate elections. We cannot see how the results arrived at under the vast variety of statutory schemes which govern such elections can prove helpful in dealing with the relatively simple problem presented in this case.

Point II.

THE DECISION OF THE REGIONAL DIRECTOR, CONFIRMED BY THE BOARD, THAT THE COMPANY HAD WAIVED ITS RIGHT TO CHALLENGE THE VOTE OF MRS. KANE OR TO OBJECT TO THE ELECTION BECAUSE OF HER VOTE CANNOT BE SUSTAINED.

If the Company is correct in its position taken under Point I, it is immaterial whether the Regional Director is correct or not in holding that the Company had "waived its right to challenge her [Mrs. Kane's] vote or to object to the election on this ground" (R. 111) or whether the Board is correct in refusing to "disturb" that decision (R. 11). If it does become material, it is the respondent's position that there is no basis for the holding that the Company had waived its right to challenge Mrs. Kane's vote or object to the election upon the ground that she was an employee.

The background of facts against which this question must be decided may be set forth as follows:

At the time of the election the respondent as a corporation had, it may be assumed, and technically speaking, knowledge that Mrs. Kane was not an employee: the notice from the Division of Employment Security (R. 116) had been received by a clerk in the employ of the Company and filed away (R. 61). Such knowledge was wholly technical and there is no evidence that the representatives of management acting for it in the election had any actual knowledge of this fact until after the election and it is clear that the Company's observers at the polls had no knowledge. Under these circumstances, Mrs. Kane was not challenged at the time she voted. At the very worst this was, as the Regional Director found, an "oversight" on the part of the Company (R. 112).

Was the Company barred forever from correcting this oversight? It is submitted it was not. The Consent Election Agreement, while providing (paragraph 6) that the

parties may have observers at the election polls "to assist in its conduct, to challenge the eligibility of voters and to verify the tally" (R. 105), contains no provision making it mandatory to have observers, or making it mandatory for them to exercise the right of challenge.* Nor is there any provision to the effect that, if a voter is not challenged at the polls, no objection to that voter may later be raised. On the contrary, the Consent Election Agreement specifically provides in paragraph 7, under the caption "Objections, Challenges, Reports Thereon," as follows:

> "Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after the issuance of the Tally of Ballots" (R. 105).

This is the only mandatory provision as to election objections in the whole agreement, the only provision setting a time within which objections must be made.

The Monday after the election (which had been held on Friday, May 5th) an employee orally protested to the Company the allowing of Mrs. Kane to vote (R. 56-57) and the facts as to Mrs. Kane were thus, for the first time, brought to the actual knowledge of the Company's management, and, within the five-day period expressly given by the above provision, the Company duly filed its objection to the determination of representatives based on the results of the balloting if Mrs. Kane's ballot was included. This was a strict compliance with the Consent Election Agreement and, unless that agreement is a snare and trap for the unwary employer, it entitled the Company to urge any objection it had "to a determination of representatives based on

*As the facts in *In re Chrysler Corporation*, *supra*, disclose, some employers never station observers at the polls and never challenge at the polls.

the results" of the balloting. The Regional Director, however, without referring in any way to the provision of paragraph 7 quoted above or referring to the fact that it had been complied with, held the respondent had "waived" its right to object to Mrs. Kane's vote because it had not challenged her at the polls. "To hold otherwise," the Regional Director stated, would "vitiate," not the Consent Election Agreement, but "the Board's procedure" (R. 111). That this is no answer to the Company's contention that it had made timely objection in strict compliance with the Consent Election Agreement is obvious. After all, the provision giving five days for the filing of objections had some meaning. It cannot be blandly disregarded because otherwise the Board's "procedure" would be "vitiated."

The Board itself realized that the Regional Director had not dealt with the Company's contention that its objection was timely because made within the five days allowed by the Agreement and attempted itself to deal with it. Its language on this point, quoted in full, is as follows:

> "2. The respondent contends that its objection to the election on the ground that Kane was not eligible to vote, was filed within 5 days after the issuance of the Tally of Ballots, as provided in the consent election agreement, and hence was timely. The respondent has misconceived the purpose of this provision which is identical with that appearing in the Board's Rules and Regulations. The objections referred to in this provision relate to the conduct of the election and not to the eligibility of the persons who vote. An objection to the conduct of an election, if sustained, voids the results of the election; while a challenge, if sustained, merely eliminates the objectionable ballot. Here, the respondent's representatives certified that the election was properly conducted; its objection merely consisted of a challenge to the ballot of Kane on the ground that

she was ineligible to vote. Moreover, insofar as the respondent's objection may be said to concern the conduct of the election, the Regional Director considered and disposed of it on the ground that the respondent was in no position to be heard thereon" (R. 11).

It is to be noted that the Board does not actually quote the provision from the Consent Election Agreement to which it refers. Anyone reading the Board's opinion without reading the language of paragraph 7 of the Consent Election Agreement would receive the impression that paragraph 7 dealt with objections "to the conduct of the election" and not with anything else. Paragraph 7, however, is, as already pointed out, captioned "Objections, Challenges, Reports Thereon," and the first sentence, already quoted, reads:

> "Objections to the conduct of the ballot, *or to a determination of representatives based on the results thereof*, may be filed with the Regional Director within five days after issuance of the Tally of Ballots" (emphasis added) (R. 105).

The italicized part of this quotation is not referred to in the Board's opinion and its discussion as to the meaning of an objection to the election has no application to an objection to a determination of representatives based on the results thereof. It is hard to think of language more apt to describe the objection the Company is making. It is precisely what the Company is doing, objecting to the Board determining representatives on the result of a ballot which included the vote of a non-employee. The Board can reach the result which it does in its opinion only by disregarding altogether this part of the provision for objections. The form of Consent Election Agreement is pre-

scribed by the Board. It is not the employer's form. It would have been easy for the Board to provide that challenges should be made only at the polls. It would have been easy for the Board to omit the part of the provision in paragraph 7 under which the respondent acted. But having done none of these things, it ill becomes the Board now to disregard this part of the provision—they never expressly refer to it in their opinion—or, if we are to take their general discussion as covering it, to try to say by strained and refined reasoning that it does not have the obvious meaning which the respondent has attached to it. The Board should have left the five-day clause out of their form altogether, or b' prepared to accept and act upon objections made within the five days in reliance on the clause. It is submitted on the foregoing that any finding that in fact the Company had waived its right to object to Mrs. Kane's situation is entirely unwarranted.

Attention is also called to the fact that in *Matter of Great Lakes Steel Corporation*, 15 N.L.R.B. 510, where no challenge had been made at the time of an election, the Board entertained a challenge made for the first time several days after the election as an objection to the Election Report. No question was raised by the Board that the challenge was not also an objection, and the objection was considered on its merit. This case has already been discussed on page 28 of the brief, to which reference is hereby made.

One further and rather curious fact relating to this part of the Board's decision may be adverted to. After attempting to distinguish between a challenge and an objection to the conduct of an election, and, as already pointed out, without adverting to the fact that a challenge is at the very least an objection to the determination of representatives based on the results of the ballot, the Board makes this statement:

> "Moreover, insofar as the respondent's objection may be said to concern the conduct of the election, the Re-

gional Director considered and disposed of it on the ground that the respondent was in no position to be heard thereon" (R. 11).

Thus, after working a brave show or arguing that an objection that a non-employee voted is not an "objection to the conduct of the election," the Board at the end rather lamely appears to concede that it may be such objection. It then goes on to say, however, that "insofar" as it is such objection, the Regional Director "disposed" of the objection by finding that the respondent was in "no position to be heard thereon." But this, of course, is the whole point before the Board. If the Board's own form of Consent Election Agreement states that objections may be filed in five days and an objection is filed in five days, why is the Company not in a position "to be heard thereon"? What more does the Company have to do to preserve its right to be heard? Does not the Board in the passage quoted from its decision in effect give away its whole case? It recognizes the Company's challenge as an objection; it was an objection concededly made on time; the Board's position in refusing to pass upon it upon the merits becomes wholly indefensible.

In passing, note may be taken of the weight which both the Regional Director and the Board appear to place upon the fact that the Company's observers, immediately after the election, signed the "Certification on Conduct of Elections" (R. 111, 11). The certification appears in full on pages 106 and 107 of the Record. It was signed at a time when the observers had no knowledge of the question as to Mrs. Kane's status. And all it certifies to, moreover, is "that the balloting was fairly conducted," that "all eligible voters were given an opportunity to vote their ballots in secret" and that "the ballot box was protected in the interest of a fair and secret vote." There is nothing in the foregoing certification inconsistent with the claim that

nevertheless a non-employee was without the knowledge of those present at the time permitted to vote.

Point III.

THE DECISION OF THE REGIONAL DIRECTOR WAS ARBITRARY AND CAPRICIOUS, AND THEREFORE CANNOT BE ALLOWED TO STAND.

The Board appears to subscribe to a doctrine that the decision of one of its Regional Directors under a Consent Election Agreement shall not be disturbed by it unless such decision was "arbitrary or capricious" (R. 11). Whether such a doctrine is sound or not, we do not believe it has any application to the present case, because, as indicated under Point I, the question here is one of the jurisdiction of the Board to make any order. The Board cannot lift itself by its own bootstraps or by the bootstraps of its Regional Director. There is no jurisdiction to find the respondent guilty of an unfair labor practice unless the Union was selected as their representative by a majority of the *employees* of the respondent. The Board's decision refusing to disturb (R. 11) the Regional Director's determination that the right to question this fact was waived by the respondent does not supply the necessary fact or confer jurisdiction. This has all been pointed out at some length under Point I, and we do not mean to reargue it here. Assuming, however, that this was a case for application of the doctrine that a Regional Director's finding will stand unless arbitrary or capricious, and will not be allowed to stand if it is arbitrary or capricious, it is hard to find a case that presents, as a matter of law, more elements of arbitrariness and capriciousness. Without elaboration, this is what the Regional Director did:

(1) Although the Company filed its objection within the five days specified by the Consent Election Agreement,

he held, without even referring to this provision, that the objection was not timely.

(2) Although the Consent Election Agreement provides that he shall pass on "questions of eligibility of voters" "raised by any party" (R. 104, par. 1), he refused to pass on the question of eligibility of Mrs. Kane raised by the Company, but ruled that the Company had no right to raise the question of her eligibility.

(3) Although the statute states that a bargaining agent must be chosen by a majority of employees, he ruled that it was immaterial whether it was chosen by a majority of the employees or by a majority made up of employees and one non-employee.

The foregoing represents serious, obvious and flagrant disregard of the terms of the Consent Election Agreement under which he purported to act, and of the law which was the source of his authority. If such action is not to be adjudged arbitrary and capricious, it is hard to know what is.

Point IV.

A DETERMINATION OF A BARGAINING REPRESENTATIVE PURSUANT TO A PRIVATE AGREEMENT BETWEEN THE RESPONDENT AND THE UNION DOES NOT RELIEVE THE NATIONAL LABOR RELATIONS BOARD FROM THE OBLIGATION OF DETERMINING THAT SUCH REPRESENTATIVE MEETS THE STATUTORY REQUIREMENTS WHEN IT SEEKS TO HOLD THE RESPONDENT GUILTY OF A STATUTORY UNFAIR LABOR PRACTICE IN REFUSING TO DEAL WITH SUCH REPRESENTATIVE.

In the present case the Board is attempting to hold the respondent guilty of an unfair labor practice because of the refusal of the respondent to deal with a Union which a third person (not the Board) has determined to be the

statutory bargaining agent. The Board itself has made no finding or determination that the Union is the statutory bargaining agent. It expressly declines to make such determination. It thus lacks, it is submitted, any basis for determination of a violation of the statute.

The respondent and the Union entered into a so-called Consent Election Agreement (R. 104-106). Agreements of this character are not provided for in the National Labor Relations Act. The Board was not a party to the agreement. The employees, or at least those who were not represented by the Union, were not parties to it. It amounted to no more than a private contract between the Company and the Union, only two, but not all of the parties, in interest. This type of agreement has been expressly held, in *Sun Ship Employees' Ass'n, Inc.*, v. *National Labor Relations Board*, 139 Fed. (2d) 744 (1945), to be nothing but a private contract between the parties to it. In that case, as in the instant case, a Consent Election Agreement had been entered into between a company and a union on a form provided by the National Labor Relations Board and bore the written approval of the Regional Director. As in the instant case, the agreement provided that the Regional Director should have certain authority to make decisions. When the union sought to sue upon this agreement in the District Court of the United States for the Eastern District of Pennsylvania, however, the Board filed a plea to the jurisdiction, which was sustained. Judgment of the District Court, dismissing the suit for lack of jurisdiction, was affirmed in the Circuit Court of Appeals* on the ground that the Consent Election Agreement was but a private agreement between private parties—the company

*The Board argued: ". . . It is, therefore, apparent that the election was held pursuant to an agreement of the parties, and not a statute regulating commerce. . . ." (p. 10, Brief for Appellees, in

and the union. The pertinent language from the opinion follows:

> "At the outset we are met with the question whether a District Court of the United States has any jurisdiction in a law suit arising out of the facts just stated. We conclude that it has not and this conclusion makes irrelevant and unnecessary the consideration of the other highly interesting questions which the argument before us has covered. The contract providing for the election, made by the three parties mentioned, was an ordinary, private agreement. It is true that it carried with it an approval by the Regional Director of the National Labor Relations Board. That, we take it, is not what gives the agreement its validity, but simply showed that the Board had no objection to an agreement among the parties concerning a matter about which petition had previously been filed with the Board. By the agreement the parties thereto consented among themselves that the issues as to representation should be settled in the way which the agreement prescribed. While we were advised by counsel and accept as true, the statement that the agreement was executed upon a form provided by the Board and customarily used in these consent elections, the use of the form did not change the fact that the agreements therein contained were those of the parties themselves, neither imposed upon them by any public body, statute or regulation, nor deriving their vitality from such sources. The agreement stated that the Regional Director was to conduct the election and be the judge. But it could have provided that any other reputable citizen, such as the local superintendent of schools, minister of the

Sun Ship Employees Association, Inc., v. National Labor Relations Board et als., Third Circuit, No. 8452, filed November 3, 1943.

local church or mayor of the city was to act in that capacity.[3]

"A law suit arising out of the alleged violation of the terms of any such agreement must, as a law suit brought upon any other alleged breach of contract in the federal courts, be subjected to the usual and obligatory test as to federal jurisdiction. The rights involved are those of parties to a contract, but whether that contract is for the purchase and payment of merchandise or the holding of an election to select a bargaining agent, the parties to a law suit arising out of the agreement cannot litigate the question in a federal court unless the usual statutory basis for jurisdiction is present. We have here no allegation that the amount in controversy exceeds $3,000; more important, we do not have here, as the plaintiff's counsel frankly admits, the requisite diversity of citizenship. The litigation therefore, is halted at the threshold by the lack of facts which open the door to federal litigation" (pp. 745-746).

"[3] Counsel for the Board advised us at the argument that persons of this type have frequently been called on to act as judges in consent elections and have sometimes conducted the elections."

As pointed out in the foregoing excerpt, not only is the Consent Election Agreement merely a private agreement, but the Regional Director acts in a private and not an official role. As the opinion and footnote indicate, some person with no official connection with the Board could just as well occupy the position occupied by the Director under the agreement and frequently does.

Buttressing this fact as to the entire private and unofficial nature of consent election proceedings are the rules of the Board itself. Section 12 of Article III of the Board's

Rules and Regulations deals with Consent Election Agreements. An examination of this section—it is quoted on pages 81-82 of petitioner's brief—makes clear that the Board merely grants its approval to the making of private agreements "leading to a statement by the Regional Director of the facts ascertained after such consent election or cross check *but not resulting in a certification by the Board under Section 9(c) of the Act*" (Petitioner's Brief, p. 82; emphasis added). It will be noted that in the present case, consonant with the above rule, the Regional Director merely issued a statement that *he* determined that the Union had been selected as the bargaining agent (R. 111). The Board itself issued no certification under Section 9(c) of the Act and there is today no official certification in effect that the Union is entitled to exclusive bargaining rights.

In the foregoing situation the respondent has refused to deal with the Union, claiming that it was not validly chosen as bargaining agent by a majority of the employees, and that the Regional Director—for the purposes of the consent agreement merely a private person—made a gross error in including the ballot of a non-employee and in refusing even to hear the respondent on its objection. The Board thereupon issued a complaint that, because of this refusal to bargain, the respondent had committed an unfair labor practice, and at the hearing on this complaint the Board refused and declined to determine whether in fact the Union was the bargaining agent, but ruled that, because some private person in Boston, who might have been anybody, had, acting under a private agreement between some of the parties to be affected, a type of agreement, not provided for or recognized by statute, made a "finding and determination" (R. 111) that the Union was validly chosen, that was as far as the Board need go and it might, without more, hold the respondent guilty of an unfair labor practice.

The foregoing procedure does not, it is submitted, comply with statutory requirements. The Board is given authority to prevent persons from engaging in unfair labor practices (Section 10(a)). To that end it is authorized to issue complaints and hold hearings, at the conclusion of which it must make its findings of fact on the matter at issue (Section 10(c)). These findings, if supported by evidence, the Act makes conclusive so far as judicial review is concerned (Section 10(e)). There is no provision anywhere for delegation by the Board of its duty to find facts on which its order is to be based.

In the present case the Board did not follow the above procedure. It issued a complaint and it held a hearing. At the hearing, however, it declined to go into the basic question of fact as to whether the bargaining agent with which the respondent had refused to deal was the true and legally chosen bargaining agent. Instead, it accepted substantially as final the statement of a private person that he had determined that the bargaining agent was properly chosen and, refusing to let the Company go behind this statement to show what the true facts were, held the respondent guilty of an unfair labor practice irrespective of the facts. This, it is submitted, was fundamental error.

Cf. *Morgan* v. *United States*, 298 U.S. 468, 481-482, in which this Court said:

> "There is thus no basis for the contention that the authority conferred by § 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact,

and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

"This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

The Act authorizes the Board to investigate representation controversies and certify the representative (Section

9 (c); Board's Brief, p. 76). There is no authority in the Act for the decentralization of the certification function—whether by the device of consent elections, with a Regional Director's "consent determination" taking the place of the Board's certification, or otherwise.

Whatever help the Board may employ in its investigations, whatever advice it may ask from subordinates and consider, the final say, the decisive act of judgment, the certification of representatives, is vested exclusively in the Board. No word in the Act suggests any other possibility.

The provisions of Section 9 (c) of the Act respecting determination of choice of representatives are exclusive. The Board is a regulatory administrative board, and there is no power given in the Act to substitute the decision of any arbitrator selected by any parties for the certification of the Board or to accomplish the same result by setting up a rule of decision whereby the Board binds itself to accept such third party decision unless arbitrary or capricious.

Viewed from this standpoint, the arbitration cases cited in the Board's brief (pp. 59-60) are entirely irrelevant. They are cases dealing with the arbitration of private rights by private parties or cases in which the Government, through a contracting officer duly authorized, has entered into a contract for the purchase of supplies or the performance of work and in which the Government's rights are similar to those of a private party. None of them indicate any basis for holding that a public regulatory board may divest itself of the power and duty imposed upon it by an act of Congress by submitting matters proper only for its own decision to an arbitrator, or by accepting as binding upon such Board the decision of an arbitrator on a matter within the field of public regulation committed to such Board. *A fortiori*, there is no authority for submitting such determination to an arbitration proceeding to which

only some, but not all, of the interested persons are parties.

It may be suggested that the view here presented means the end of the usefulness of Consent Election Agreements. This, of course, may be true, but, if it is true, it is a consequence of the law and furnishes no excuse for departing from the law. If Congress had wished to permit the Board to delegate its tremendous fact-finding powers to private persons, it could have easily done so. It did not do so, and the fact that the Board has found it convenient to assume an authority not granted it is no argument for permitting the controversial usurpation of that authority. As a matter of fact, however, it is probable that, notwithstanding the view here urged, the Consent Election Agreement will continue to serve the same useful function as in the past and serve to produce an acceptable determination of representatives in those cases where the only question is the mechanical one of determining whether there were more votes cast for a union than against it.

Point V.

THE NATIONAL LABOR RELATIONS BOARD MAY NOT DELEGATE ITS STATUTORY DUTIES OR AVOID JUDICIAL REVIEW OF ITS ACTS BY PROVIDING BY RULE THAT IN THE CASE OF CONSENT ELECTIONS THE RULINGS OF THE REGIONAL DIRECTOR SHALL BE FINAL.

For the first time the Board has in its brief filed in this Court sought to support its decision by reference to Article III, Section 12, of its Rules and Regulations, wherein it is provided that in the case of a consent election the "rulings of the Regional Director" shall be final (Petitioner's Brief, p. 54). This provision of the rules was not urged by counsel for the Board before the Board, nor is it referred to in

the Board's decision or made the basis of the Board's decision. In its brief and oral argument before the Circuit Court of Appeals the Board made no reference to this rule. The rule is not part of the record certified from that Court to this. The rule has been brought into the case for the first time by inclusion as an appendix by the Board to its brief in this Court (Petitioner's Brief, pp. 81-82). There is thus raised the question of whether the Board may at this juncture properly ask to have its decision considered on a basis other than that upon which it was made. If that question is passed, there is then the question of whether the Board can by a rule of this character avoid its statutory duty to determine bargaining representatives, and can by rule avoid judicial review of action taken by it or by any of its agents. We shall discuss these questions in the order outlined.

A.

Section 12 of Article III, Series 3, of the Board's Regulations, effective November 26, 1943, reads in part as follows:

> "The method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections directed by the Board pursuant to Section 9, Article III, of the Rules and Regulations, *except that the rulings of the Regional Director shall be final, and the statement of the Regional Director of the results thereof shall be final*" (Board's Brief, p. 82, emphasis added).

The foregoing provision of the Regulations is, it is submitted, irrelevant in the present case because the decision of the Board was not based thereon, but instead on a finality

doctrine respecting the finality proviso in Consent Election Agreements.

The finality proviso in the Consent Election Agreement reads as follows:

> ". . . provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to eligibility of votes, raised by any party hereto relating in any manner to the election" (R. 104, par. 1).

The finality doctrine of the Board is a rule of decision adopted by the Board based on the analogy of judicial enforcement at common law of agreements to abide by the award of an arbitrator applied to the finality proviso in Consent Election Agreement.

The finality doctrine was applied in a Board's decision in the case of *Capitol Greyhound Lines*, 49 N.L.R.B. 156, decided April 27, 1943, already referred to.

The Consent Election Agreement in that case was dated August 22, 1942 (49 N.L.R.B. at p. 163). It contained the usual finality proviso (*id.*, p. 164). The vote of Nolan was not challenged, but the respondents filed objections to the determination of the results based on the election (*id.*, p. 165), alleging that Nolan had been improperly permitted to vote although his name was on the list of eligible voters (*id.*, p. 165). The Regional Director overruled the objections, including that respecting Nolan's vote; and the Board ruled that the respondents did not have the right to appeal the Regional Director's rulings on objection to the Board (*id.*, p. 167). In the unfair labor practice proceeding, the Trial Examiner ruled that Nolan should not have been counted, because he was not entitled to be on the eligibility list (*id.*, pp. 169-170), although he was a bus driver at the time he voted. The Trial Examiner recommended dismis-

sal of the complaint (*id.*, pp. 171-172). The Board reversed. The Board found that the ruling of the Regional Director was neither arbitrary nor capricious (*id.*, p. 159), and stated:

> "In the absence of such conduct, we feel ourselves bound by the terms of the agreement providing for the finality and binding effect of the Regional Director's determination to the same extent as a court is bound by an agreement to abide by an arbitrator's award" (*ibid.*).

Two judicial decisions are cited in a note; also a reference to Williston on Contracts and the Restatement of the Law of Contracts.

It was approximately seven months after the decision of the *Capitol Greyhound Lines* case by the Board (April 27, 1943) that the finality provision of the Regulations first went into effect (November 26, 1943).

In the *Aetna Fire Brick Company* case, 56 N.L.R.B. 849, decided May 25, 1944, the Consent Election Agreement was dated December 10, 1942 (56 N.L.R.B. at p. 852), and the Board said:

> "Under the circumstances, and regardless of how we might have determined the question if the respondent had not authorized the Regional Director to determine it, we cannot say that the Regional Director's determination was arbitrary and capricious, or that it lacked substantial support in the record. Accordingly we shall not disturb his determination that Gray did not come within the appropriate unit" (56 N.L.R.B. at p. 854).

The Consent Election Agreement in the instant case was executed April 27, 1944 (R. 106), approximately five months

after the "effective date" of the finality provision of the Regulations.

Notwithstanding this fact, neither the Trial Examiner in his Intermediate Report (R. 27) nor the Board in its decision (R. 10-13) placed any reliance on the finality provision of the Regulations. The Trial Examiner concluded that the Regional Director's certification* of the Union was neither arbitrary nor capricious and was accordingly binding upon the parties to the Agreement for Consent Election, citing the *Capitol Greyhound Lines* and *Aetna Fire Brick* cases (R. 27, n. 14). The Board said:

> "As we have previously held [referring to the *Capitol Greyhound Lines* and *Aetna Fire Brick* decisions] we will not disturb the rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" (R. 11).

This was in line with the contention made by counsel for the Board at the hearing before the Trial Examiner (R. 42-43).

The Court below was not called upon to pass on the question whether the finality provision of the Regulations furnished a legal justification for the Board's decision, since the Board had not based its decision on the finality provision of the Regulations. *Securities & Exchange Comm.* v. *Chenery Corp.*, 318 U.S. 80.

The Court below did not pass on the question whether the finality provision of the Regulations justified the Board's

*"Certification" is inaccurate. The Board may certify (Act, Section 9(c)), but there is no provision for delegation of its authority. The Consent Election Agreement described the Regional Director's action as a "consent determination of representatives" (R. 105).

decision, nor was any determination of that question implicit in the decision of the Court below, since it was bound only to judge the Board's decision on the ground on which it was explicitly based, viz., the common law analogy of an agreement to abide by an arbitrator's award. The Board's decision in the instant case incorporated by reference the basis of the decision of the *Capitol Greyhound* case (R. 11, n. 1).

Consequently it was not open to the Board, on petition for certiorari to the Court below, to raise the question "whether a regulation of the board [referring to the finality provision of the Regulations] is valid" (Board's Brief, p. 2, par. 2).

B.

But if the Board should be permitted at this late stage of the proceedings, in the instant case, to shift its ground to the finality regulation, as a means of saving its decision, it does not really advance itself any, for everything which has been said under Point IV, *supra*, as to the impropriety of the Board's accepting the findings of a private person under a private agreement and thus avoiding its own duty to make findings would apply. Whether the Board elects to accept such findings as a matter of decision in the individual case or undertakes by rule to do so, the practice is equally repugnant to the statutory requirements. This aspect of the matter will not be further elaborated here, but reference is made to the discussion already had under Point IV, *supra*.

In addition to the foregoing it is of interest to inquire if the quoted provision of the Regulations fulfills the statutory test that it is "necessary to carry out the provisions of the Act" (Act, Section 6; Board's Brief, Appendix, p. 75). The Act has numerous provisions. It is inconceivable

that the rule-making power was intended by Congress to enable the Board to promote certain provisions of the Act while nullifying the effect of other provisions of the Act.

There may be a distinction between what is "necessary" and what is merely "convenient" or desirable to the Board for one reason or another. It would be difficult to show a real necessity for dispensing with Board-directed elections. The most that can be said is that the consent election procedure may save time in some instances. But non-reviewability of the Regional Director's rulings is not a necessary feature, because, as pointed out in the Report of the Attorney General's Committees on Administrative Procedure (1941):

> "While the objection procedure entails some small delay in completing proceedings, its retention is no doubt desirable in order to dispose of all doubts concerning the fairness of the elections conducted at the Board's direction. In any event, there is no substantial postponement of certification following the counting of the ballots" (Part V, "National Labor Relations Board," p. 36).

The provisions for judicial review contained in the Act have been relied on by this Court in upholding the constitutional validity of the Act over the objection that the Act offended against the constitutional requirements governing the creation and action of administrative bodies. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47.

The Board's actions and determinations of fact and law in representation proceedings were intended by Congress to be subject to the same court review as was provided for other determinations of the Board in unfair labor practice proceedings under Sections 10(b) and 10(c) of the Act (House Report, No. 1147, Committee on Labor, 74th Con-

gress, 1st Session, p. 23, quoted in *A. F. of L.* v. *Labor Board*, 308 U.S. 401, 410, 411, note 3). The qualification in Section 9(d) of the Act is not on the scope of review of representation proceedings, but as to the time when and circumstances under which such review may be had.

The attempt to make the "consent determination of representatives" by Regional Directors final by means of the finality provision of the Regulations is just as fully defiant of the declared purpose of Congress as would be a regulation that a certification by the Board under Section 9(d) should be final. The finality provision actually enacted is an obvious attempt to exempt the acts of administrative agents of the Board from judicial review.

Willingness of the Board to review the Regional Director's rulings to determine whether they are "arbitrary or capricious" does not give the scope of review contemplated by Section 10(e) or Section 10(f) of the Act, which is applicable to Section 9(c) proceedings.

Conclusion.

For reasons hereinbefore stated, we respectfully submit that the decree of the Court below should be affirmed.

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JOHN T. NOONAN,
EDWARD E. ELDER,
Attorneys for Respondent.

October, 1946.

P.10

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1946.

National Labor Relations Board Petitioner, *v.* A. J. Tower Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[December 23, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

The issue here concerns the procedure used in elections under the National Labor Relations Act[1] in which employees choose a statutory representative for purposes of collective bargaining. Specifically, we must determine the propriety of the National Labor Relations Board's refusal to accept an employer's post-election challenge to the eligibility of a voter who participated in a consent election.

The respondent and a union entered into an agreement to conduct an election by secret ballot on May 5, 1944, under the supervision of the Board's regional director, to determine whether the employees at respondent's Roxbury plant in the unit defined in the agreement desired to be represented by the union. The agreement was approved by the regional director and provided that the election was to be held "in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board."

The agreement set forth the qualifications for participation in the election. Only those who appeared on the pay-roll on April 21, 1944, were eligible; included were those employees who did not work at the time because they were ill, or on vacation, or temporarily laid off, or in the armed forces. The respondent had the duty of furnish-

[1] 49 Stat. 449, 29 U. S. C. § 151, *et seq*

ing the regional director with an accurate list of the eligible voters, together with a list of the ineligible employees.[2] The list of eligible voters was duly submitted on May 1, 1944.

The agreement further provided that both the union and the respondent could have observers at the polling places to assist in the handling of the election, to challenge the eligibility of voters and to verify the tally. If challenges were made and if they were determinative of the results of the election, the regional director was to investigate the challenges and issue a report thereon. All objections "to the conduct of the ballot" or "to a determination of representatives based on the results thereof" were to be filed with the regional director within five days after issuance of the "Tally of Ballots." If the regional director sustained the objections, he had the power to void the results and order a new election. The determination of the regional director was to be final and binding upon any question, "including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election." Cf. Article III, §§ 10 and 12, of the Board's Rules and Regulations (Series 3, effective Nov. 26, 1943).

The balloting took place on May 5 in accordance with this agreement. After the ballots were counted, the union and the respondent signed a "Tally of Ballots," in which the regional director certified that, of the 230 valid votes counted, 116 were cast for the union and 114 against it, with one other ballot being challenged by the union.[3] Four days later, on May 9, respondent's counsel wrote the

[2] Among the ineligible persons were those who had quit or been discharged for cause and had not been rehired or reinstated prior to the date of the election.

[3] It was unnecessary to rule on the challenged ballot since it could not affect the result of the election, even though the ballot proved to be against the union.

regional director that subsequent to the election "it came to the attention of the management of the Company that Mrs. Jennie A. Kane, one of the persons who voted at the election, was not at the time an employee of the Company."[4] The letter explained that Mrs. Kane was employed by respondent from March 16, 1943, through March 24, 1944, but that after the latter date she had never reported again for work and had never appeared at the plant except for purposes of voting on May 5. It was admitted that the respondent, "not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill, and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote." The letter accordingly challenged Mrs. Kane's right to vote, as well as the ballot cast by her. A hearing was requested for the purpose of passing upon the one ballot challenged by the union. If that challenge were not sustained and the ballot proved to be a vote against the union, Mrs. Kane's ballot would become material to the result of the election; on that condition, the respondent requested a hearing on its challenge to Mrs. Kane's vote.

A hearing on the matters raised by this letter was held before the regional director. He subsequently made a report in which he found that respondent included Mrs. Kane's name on the list of eligible voters submitted on May 1 on the assumption that she was ill and had not quit

[4] The letter recited that "it has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she 'could not continue to do heavy work of carrying bundles which was part of her job.' The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment."

her job; that respondent made no attempt between May 1 and May 5 to remove Mrs. Kane's name from the list, although prior to the election respondent received by mail a notice of Mrs. Kane's claim for unemployment compensation; that respondent's observers at the polls had not challenged Mrs. Kane when she voted in their presence; and that these observers certified before the ballots were counted that the election had been properly conducted. The regional director also found that the evidence was conflicting as to Mrs. Kane's actual status.[5] But he concluded that under the circumstances the respondent had waived its right to challenge her vote or to object to the election on this ground. This determination made it unnecessary for him to rule on the ballot previously challenged by the union, since it could not affect the result. He thus found that the union had received a majority of the valid votes cast and was the exclusive representative of the employees in the appropriate unit.

The respondent thereafter refused to bargain with the union in question. Upon a complaint issued by the Board, the respondent admitted its refusal but denied that the

[5] An agent of the Board interviewed Mrs. Kane and was told by her that: "On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think my application for unemployment benefits would be considered a termination from the Company. . . . On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself as an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co."

But the regional director pointed out that, despite this statement, subsequent investigation confirmed the fact that Mrs. Kane advised the Division of Employment Security on April 28, 1944, that she had left her employment with the respondent in March because of the heavy work in carrying bundles. See note 4, *supra*.

union had ever been designated by a majority of the employees in the appropriate unit. It asserted that the election of May 5 was inconclusive on the subject because if Mrs. Kane's ballot were subtracted from the union's total and if the ballot challenged by the union were opened upon overruling the challenge and proved to be against the union, the outcome of the election would be a tie vote. The Board, after the usual proceedings, held that it would not disturb the rulings of a regional director on questions arising out of a consent election "unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" and that no such grounds for disturbing the ruling were present in the instant case. As an alternative ground for its action, the Board held that the regional director's refusal under the circumstances to permit an attack on Mrs. Kane's status as a voter after the results of the election had been announced "is in complete accord with the established principles and policy of the Board"—which excluded post-election challenges "because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result." See also *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512. The Board accordingly ordered respondent to cease and desist from its unfair labor practice and to take the affirmative action of bargaining collectively with the union. 60 N. L. R. B. 1414.

The First Circuit Court of Appeals, however, set aside the Board's order. 152 F. 2d 275. It construed the Act as making it a jurisdictional prerequisite to a determination that an employer has committed the unfair labor practice of refusing to bargain collectively that the union with which he has refused to deal should have been chosen by a majority of those voting who were in fact employees. It held that since the vote challenged by the union may have been cast against it and since Mrs. Kane was not

found to have been an employee on the crucial date, there may have been a tie vote and the Board was without jurisdiction to find the respondent guilty of a violation of § 8 (5). We granted certiorari because of the importance of the matter in the administration of the Act and because of a conflict between the result below and that reached by the Sixth Circuit Court of Appeals in *N. L. R. B.* v. *Capitol Greyhound Lines*, 140 F. 2d 754.

As we have noted before, Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31, 37; *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 226; *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 458. Section 9 (c) of the Act authorizes the Board to "take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." In carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in § 9 (a), a rule that "is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions." S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. It is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.

The principle of majority rule, however, does not foreclose practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud. Indeed, unless such adjustments are made, the democratic process may be perverted and the election may fail to reflect the will of the majority of the electorate. One of the commonest protective devices is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are

given absolute finality. In political elections, this device often involves registration lists which are closed some time prior to election day: all challenges as to registrants must be made during the intervening period or at the polls. Thereafter it is too late. The fact that cutting off the right to challenge conceivably may result in the counting of some ineligible votes is thought to be far outweighed by the dangers attendant upon the allowance of indiscriminate challenges after the election. To permit such challenges, it is said, would invade the secrecy of the ballot, destroy the finality of the election result, invite unwarranted and dilatory claims by defeated candidates and "keep perpetually before the courts the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with the close of the polls." Cooley, Constitutional Limitations (8th ed., 1927), p. 1416.

Long experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge and its identity has been lost, its validity cannot later be challenged. This rule is universally recognized as consistent with the democratic process. And it is generally followed in corporate elections. The Board's adoption of the rule in elections under the National Labor Relations Act is therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.

Moreover, the rule in question is one that is peculiarly appropriate to the situations confronting the Board in these elections. In an atmosphere that may be charged with animosity, post-election challenges would tempt a losing union or an employer to make undue attacks on the eligibility of voters so as to delay the finality and statutory effect of the election results. Such challenges

would also extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the pay-roll list in the hope that they might escape challenge before voting, thereafter giving rise to a charge that the election was void because of their ineligibility and the possibility that they had voted with the majority and were a decisive factor. The privacy of the voting process, which is of great importance in the industrial world, would frequently be destroyed by post-election challenges. And voters would often incur union or employer disfavor through their reaction to the inquiries.

We are unable to say, therefore, that the Board's prohibition of post-election challenges is without justification in law or in reason. It gives a desirable and necessary finality to elections, yet affords all interested parties a reasonable period in which to challenge the eligibility of any voter. And an exception to the rule is recognized where the Board's agents or the parties benefiting from the Board's refusal to entertain the issue know of the voter's ineligibility and suppress the facts.[6] The Board thus appears to apply the prohibition fairly and equitably in light of the realities involved.

The reliance of the court below upon the asserted jurisdictional requirement was misplaced. It is true that it is an unfair labor practice for an employer to refuse to bargain with a union only if that union was chosen by a majority of the voting employees. But the determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion. The rule prohibiting post-election challenges is one of those rules. When it is applied properly, it cannot deprive the Board of jurisdiction to find an unlawful failure to bargain collectively. That is

[6] See *Matter of Wayne Hale*, 62 N. L. R. B. 1393; *Matter of Beggs & Cobb, Inc.*, 62 N. L. R. B. 193.

true even where it subsequently is ascertainable that some of the votes cast were in fact ineligible and that the result of the election might have been different had the truth previously been known. The rule does not pretend to be an absolute guarantee that only those votes will be counted which are in fact eligible. It is simply a justifiable and reasonable adjustment of the democratic process.

There is no basis in the instant case for disregarding the Board's policy in this respect. The fact that the respondent may have been honestly mistaken as to the status of Mrs. Kane has no relevance whatever to the justification for the use of the policy. And nothing in the consent agreement constituted a waiver of the policy by the Board. On the contrary, the agreement expressly stated that the election was to be held in accordance with "the customary procedures and policies of the Board," which would include the policy prohibiting post-election challenges. The provision as to the filing of objections "to the conduct of the ballot" and "to a determination of representatives based on the results thereof" within five days after issuance of the "Tally of Ballots," a provision which was quite separate from that relating to challenges, obviously has no application here. Objections and challenges are two different things in electoral parlance. Objections relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly. Challenges, on the other hand, concern the eligibility of prospective voters. The Board uses this clear distinction as a matter of policy and we are not free to disregard it.[7]

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[7] "The Board follows a policy of differentiating between objections to the conduct of an election and challenges [to] the eligibility of voters and it does not ordinarily permit challenges under the guise of objections after the election." *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512. Cf. *Matter of Great Lakes Steel Corporation*, 15 N. L. R. B. 510.

Neither the record in this case nor the past history of the policy against post-election challenges justifies an assumption that the interests of the anti-union employees in this election were inadequately protected. Due notice of the manner and conduct of the election was given to all employees; and, despite the lack of any affirmative provisions in the consent agreement, there was no indication that any of the employees were prohibited from examining the eligibility list or from challenging any prospective voter. Nor was there competent evidence that any anti-union employee made any objection, either before or after the election, to the procedure adopted or to the casting of any ballots.[5] Moreover, the representatives of the Board, as well as those of the respondent, were bound to perform their electoral functions on behalf of all employees, including those with anti-union sentiments. In the absence of any evidence that such representatives discriminated against the anti-union employees in preparing the eligibility list or in raising timely eligibility issues, we cannot say that the interests of those employees were inadequately represented.

Since we rest our decision solely on the propriety of the Board's policy against post-election challenges, it is unnecessary to discuss the effect to be given by the Board to the

[5] The respondent's factory superintendent testified that an unidentified employee came to him and "objected to the vote of this Jennie Kane" several days after the election and even longer after the receipt by respondent of the notice of Mrs. Kane's unemployment compensation claim, which had been mailed to respondent before the election. This testimony was admitted merely to show "how the company became interested in the question" of Mrs. Kane's eligibility. The Board, of course, was not compelled to accept this hearsay testimony as proof of an objection to Mrs. Kane's vote by an anti-union employee or as an indication that the interests of anti-union employees may have been inadequately represented.

regional director's ruling that the respondent waived its right to challenge Mrs. Kane's vote or the effect to be given to the terms of the consent election agreement apart from the general policy.

It follows that the court below erred in refusing to enforce the Board's order in full.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1946.

National Labor Relations Board, Petitioner, v. A. J. Tower Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[December 23, 1946.]

Mr. Justice Jackson, dissenting.

If the only interests affected were the complaining employer and the victorious union, I should agree with the Court's decision. But there is a third and, as usual, a forgotten interest here—those employees who did not want to be represented by the union.

The election was held by agreement between the employer and the union which was seeking to organize the plant. The Company was to furnish a list of eligible voters. The Company and the union were each to have observers attend, with the right to challenge the voters. The agreement did not give anti-organization employees either observers or the right to challenge. The certified result of 116 union against 114 anti-union votes was reached by not counting a ballot which the union challenged and by counting the ballot which the Company now points out was probably invalid. Mrs. Kane's vote, no matter whether valid or invalid, is thus allowed to decide the election.

It is in evidence and undisputed that after the election, an employee—presumably anti-union, from the circumstance that he was objecting—raised the question that Mrs. Kane, who was carried on the Company's eligible list because the Company believed she was absent for illness had, in fact, left the employ of the Company with no intention to return. If that is true, she was not a qualified voter.

But because there was no challenge at the time her ballot was cast, the Court holds there can be no inquiry into its validity. Comparison with the practice at general public elections is specious, for in those elections every citizen has a right of challenge and registration lists usually are made up and available in advance. No comparable safeguards for the employees opposed to the union appear to exist here, though both the employer and the union were protected.

The Court takes the position that although every other interest has affirmative protection, there is no necessity for similar affirmative protection to the anti-union employees. Despite the fact that both of the contracting parties were careful to provide such protection for themselves, the Court assumes it is unnecessary for the third interest. The Court says that in the absence of evidence, it will assume that such interests were adequately represented, at the same time closing the door to hearing evidence as to whether those interests were prejudiced unless those who are denied affirmative representation or challenge rights should have made affirmative objection before the wrong was consummated by casting the illegal ballot. And, of course, the members of such a minority have no standing to bring their problems either to the Board or to the Court. We hear of their grievance, if at all, only through its being identical with some complaint which the employer raises.

The Court fears that to permit inquiry into the validity of Mrs. Kane's vote would "extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the payroll list" who would be challenged after the election in the hope of voiding an unwanted result. Of course, there are opportunities for manipulation of such a list, for collusion between employer and favored groups, for fraud, and for honest mistakes.

But if the Court is concerned to keep the elections pure, why close the door to proof of such corruption or mistake when it operates against an anti-union group, because it has not been challenged by one of the parties to it: to wit, the employer? In the usual election, it may be desirable to put an end to challenges at the time when the ballots become intermingled and indistinguishable. But to justify cutting off inquiry, it should appear that all persons interested in the election have had adequate opportunity to question the ballots cast. As long as no such provision is made for employees who are opposed to organization, I would protect their rights by allowing post-election challenges on such grounds as are urged here.

Of course the protection this gives is far from satisfactory. The challenge must be initiated by the parties the Board recognizes, the employer or the union. But there will be some instances in which their interest coincides with that of the anti-union employees. On the other hand, I can scarcely think of a more perfect device for encouraging unscrupulousness, than to invest it with finality against all inquiry either by the Board or the courts. Here half the employees are forced to accept union representation as the result of an election in which they were not allowed to protect the ballot, and those who were, failed to do so. If I really wanted to discourage fraud, collusion, and mistakes, and protect the integrity of elections and the rights of both minority and majority, I should hold that such elections can be looked into whenever irregularity appears to have affected the result.